ARTICLE

HOW PRIVATE ACTORS ARE IMPACTING U.S. ECONOMIC SANCTIONS

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ABSTRACT

Economic and trade sanctions are typically understood as the exclusive province of governments and intergovernmental organizations. Private parties have, however, long played a role in sanctions regimes. For example, private plaintiffs holding unsatisfied, terrorism-related civil judgments have used various U.S. federal statutes to enforce those judgments against assets blocked by U.S. sanctions. Most recently, plaintiffs with judgments against the Taliban have used some of those federal laws to execute against the financial assets of Afghanistan's central bank. These and other efforts to enforce terrorism-related civil judgments are more than just attempts to collect on outstanding damages awards. Rather, they allow private parties to utilize U.S. sanctions to further their own parochial, monetary goals. Through this involvement in the U.S. sanctions system, private plaintiffs are able to influence and even expand the scope and reach of U.S. sanctions while also reinforcing some of their most troubling consequences. Situating these private judgment enforcement suits within a broader framework of private involvement in sanctions, this Article demonstrates how private actors are participating in U.S. sanctions in ways that further their own personal interests, while also bolstering U.S. government policies that undermine civil liberties, target black and brown communities, and deplete the wealth of countries impacted by sanctions.

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INTRODUCTION

Economic and trade sanctions are often understood as the exclusive province either of governments or intergovernmental organizations.[1] Private parties

[1] *See, e.g.*, Perry S. Bechky, *Sanctions and the Blurred Boundaries of International Economic Law*, 83 MO. L. REV. 1, 3 (2018) (describing sanctions as "'measures of an economic—as contrasted with diplomatic or military—character *taken by states* . . . .'") (emphasis added)

have, however, long played various roles in sanctions regimes, sometimes acting independently of and sometimes in concert with states.[2] Recent litigation in U.S. courts involving Afghanistan's central bank is a case in point.

Following the Taliban's abrupt takeover of Afghanistan in August 2021, private plaintiffs in various terrorism-related cases placed liens on funds owned by the Afghan central bank, totaling approximately $7 billion and held in the United States.[3] These attachment efforts against the central bank aimed to fulfill judgments plaintiffs had won under various laws—including the Anti-Terrorism Act's ("ATA") private right of action, 18 U.S.C. § 2333 ("Section 2333" or "ATA private right of action")[4]—against the Taliban,[5] which had never been paid.[6]

Plaintiffs' judgment enforcement suits were relatively unusual. Efforts to enforce civil judgments—which typically involve locating defendant's assets, placing a writ of execution on those assets, and then liquidating or selling those assets for cash—are a common way for plaintiffs to satisfy final monetary awards against defendants who fail to pay.[7] Typically, these judgment enforcement suits cannot be brought against assets subject to U.S. sanctions.[8] In the Afghan central bank case, however, plaintiffs relied on a federal statute unavailable to most litigants—the Terrorism Risk Insurance Act ("TRIA")[9]—that allows precisely

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(quoting ANDREAS F. LOWENFELD, *Preface to the Second Edition* of INTERNATIONAL ECONOMIC LAW, at v, vii (2d ed. 2008)).; Barry Carter & Ryan Farha*, Overview and Operation of U.S. Financial Sanctions, Including the Example of Iran*, 44 GEO. J. INT'L L. 903, 903 (2013) (describing economic sanctions as tools used by "the United Nations, regional entities, and individual countries . . . ."); *infra* note 22 and accompanying text (describing economic sanctions as "government-inspired").

[2] *See infra* Part I.

[3] *See infra* Part III.C.1.a. and accompanying text. For a more in-depth discussion of the Afghan central bank case see Part III.C.1.a. As discussed there, the Biden administration had prevented the Taliban from accessing the central bank's funds after the group came to power. That move helped prompt the filing of private liens against those funds. *See infra* note 368–72 and accompanying text.

[4] *See infra* notes 133–36 and accompanying text for a description of how Section 2333 operates.

[5] As explained more fully below, these judgments were only against the Taliban, not against Afghanistan or its central bank. *See infra* note 367 and accompanying text.

[6] *See* Letter from Attorney Michael Baumeister to Magistrate Judge Sarah Netburn, *In re: Terrorist Attacks on September 11, 2001*, No. 1:03-md-01570 (S.D.N.Y. Mar 22, 2022), ECF No. 7792 (letter filed by plaintiff-side attorney in the Afghan central bank litigation noting that "[f]or decades there was no opportunity . . . through which . . . any . . . plaintiffs could seek to satisfy their outstanding judgments against the Taliban"). The underlying judgments against the Taliban were default judgments, as the Taliban did not appear or otherwise defend themselves in these cases. Many, if not most, of the judgments enforced through the judgment enforcement mechanisms discussed in this Article are default judgments. *See infra* note 144 and accompanying text.

[7] *See generally* JAMES J. BROWN, JUDGEMENT ENFORCEMENT ch. 3, 5 (3rd ed. Supp. 2023-2). I alternatively refer to the judgment enforcement efforts discussed in this Article as "attachment" or "execution" efforts.

[8] *See infra* note 214 and accompanying text.

[9] Terrorism Risk Insurance Act, Pub. L. No. 107-297, § 201, 116 Stat. 2322, 2337-40 (2002) (codified as amended at 28 U.S.C. § 1610).

those kinds of assets to be targeted. Under TRIA, private plaintiffs holding unsatisfied final judgments against terrorist actors—pursuant to Section 2333 of the ATA, as well as other laws, including a specific section of the Foreign Sovereign Immunities Act ("FSIA")[10]—can enforce those judgments against properties restrained by certain U.S. sanctions regimes.[11] It is this reliance on U.S. sanctions that makes the judgment enforcement efforts in the Afghan case—as well as all other TRIA suits—notable and unusual.[12] Citing to U.S. sanctions against the Taliban,[13] plaintiffs in the Afghan central bank case argued that those sanctions applied to the bank's assets and made them susceptible to TRIA attachment because the Taliban now controlled Afghanistan.[14]

This Article will describe these and other sanctions-dependent private judgment enforcement efforts relating to unsatisfied civil damages awards in terrorism cases involving Sections 2333 and/or the relevant FSIA provision, 28 U.S.C. § 1605A ("Section 1605A" or "FSIA Terrorism Exception"), which authorizes civil suits against designated state sponsors of terrorism. It makes several key contributions along the way. First, this Article provides a framework—the first within legal scholarship—for identifying the ways in which private actors are involved in economic sanctions to varying degrees both in the United States and other countries.[15] It situates terrorism-related private judgment enforcement efforts within that framework.

Second, this Article demonstrates how these private judgment enforcement efforts are more than just run-of-the-mill attempts to collect on unsatisfied damages awards against terrorist actors. Rather, these suits allow private parties—whether or not they are aware—to shape and even expand U.S. sanctions regimes, while also reinforcing some of the most troubling consequences of U.S. sanctions

[10] Specifically, TRIA can be used to enforce judgments won pursuant to FSIA provision 28 U.S.C. § 1605A ("Section 1605A"), which authorizes civil litigation against designated state sponsors of terrorism for engaging in specified terrorism-related acts. *See infra* notes 137–42 and accompanying text for a description of how Section 1605A operates, as well as the process for designating state sponsors of terrorism. As discussed below, the U.S. State Department is typically responsible for designating state sponsors of terrorism. *See infra* note 189.

[11] While TRIA does not limit judgment enforcements suits only to claims brought under Sections 2333 and 1605A, these are the laws most often used to sue terrorist actors in U.S. courts. Though other federal statutes, as well as state laws, can also be the basis for terrorism-related civil suits, they are beyond this Article's scope, as explained below. *See infra* note 131.

[12] As mentioned below, the Biden administration has taken various measures that have impacted plaintiffs' TRIA suits against Afghanistan's central bank assets. *See infra* notes 380–83.

[13] Since 1999, the U.S government has imposed various sanctions against the Taliban. *See, e.g.*, Exec. Order No. 13,129, 64 Fed. Reg. 36759 (July 4, 1999) (presidential order establishing first set of U.S. sanctions against the Taliban); CLAYTON THOMAS, CONG. RSCH SERV., R46955, TALIBAN GOVERNMENT IN AFGHANISTAN: BACKGROUND AND ISSUES FOR CONGRESS 29-30 (Nov. 2, 2021), https://crsreports.congress.gov/product/pdf/R/R46955 [https://perma.cc/2K74-Q4V7] (describing history of U.S. sanctions against the Taliban).

[14] *See infra* note 374 and accompanying text.

[15] *See infra* Part I.

policies.[16] In highlighting these dynamics, this Article implicitly suggests how the other forms of private involvement in sanctions described herein may similarly shape and expand sanctions programs and exacerbate their negative effects.[17]

Finally, in surfacing the relationship between sanctions—which play an important role in dealing with perceived threats to U.S. national security[18]—and private judgment enforcement efforts, this Article builds upon my previous work examining how private actors enforce the U.S. government's national security priorities through civil litigation.[19]

Though difficult to define in the abstract,[20] modern state or intergovernmental-led economic sanctions[21] have been broadly described as "the deliberate, government-inspired withdrawal, or threat of withdrawal, of customary trade or financial relations."[22] Globally, the use of sanctions has skyrocketed since the end of the Cold War.[23] In practice, sanctions can include embargoes on goods, such as military weapons; other kinds of trade restrictions, whether on imports or exports; financial sanctions; travel bans; and asset freezes.[24] Sanctions can be multilateral—involving several states or international organizations, like the UN—or unilaterally imposed by one state.[25] They can be country-based or targeted.[26] While country-based sanctions can be comprehensive and "broad in scope, placing a large number of restrictions on entire states and societies,"[27] targeted sanctions

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[16] *See infra* Part II.
[17] *See infra* note 129 and accompanying text.
[18] *See generally* JUAN ZARATE, TREASURY'S WAR: THE UNLEASHING OF A NEW ERA OF FINANCIAL WARFARE (2013) (describing the central role played by economic sanctions in U.S. national security strategy since 9/11).
[19] Maryam Jamshidi, *The Private Enforcement of National Security*, 108 CORNELL L. REV. 739 (2023).
[20] ALAN DOBSON, US ECONOMIC STATECRAFT FOR SURVIVAL 1933-1991: OF SANCTIONS, EMBARGOES AND ECONOMIC WARFARE 7 (Routledge 2002).
[21] While economic sanctions have existed in various forms for thousands of years, the modern system of economic sanctions did not emerge until the end of World War I. NICHOLAS MULDER, THE ECONOMIC WEAPON: THE RISE OF SANCTIONS AS A TOOL OF MODERN WAR 13 (Yale Univ. Press 2022).
[22] GARY CLYDE HUFBAUER ET AL., ECONOMIC SANCTIONS RECONSIDERED 3 (3rd ed. 2007).
[23] Compared to the period running from 1950-1985, the use of sanctions doubled in the 1990s and 2000s. MULDER, *supra* note 21, at 296. It doubled again in the 2010s. *Id.*
[24] GEOFF SIMONS, IMPOSING ECONOMIC SANCTIONS: LEGAL REMEDY OR GENOCIDAL TOOL? 2 (Pluto Press 1999); Jonathan Masters, *What Are Economic Sanctions?*, COUNCIL FOREIGN REL. (Aug. 12, 2019), https://www.cfr.org/backgrounder/what-are-economic-sanctions [https://perma.cc/PTJ7-R6YM].
[25] Victoria Anglin, *Why Smart Sanctions Need a Smarter Enforcement Mechanism: Evaluating Recent Settlements Imposed on Sanction Skirting Banks*, 104 GEO. L. J. 693, 697–98 (2016).
[26] *Id.* at 697.
[27] *Id*.

aim—at least in theory—to operate more narrowly and limit or prohibit transactions with specific individuals or state or non-state entities,[28] like corporations.[29]

Typically, sanctions prohibit nationals from the sanctioning country, entities owned or controlled by those nationals, or individuals or entities operating from within the state's territory, from engaging in transactions with sanctioned persons or entities.[30] Over the last few decades, some countries—particularly the United States—have instituted "secondary" sanctions that expand the reach of their sanctions programs by prohibiting other governments, as well as nationals of third countries located outside the sanctioning state, from engaging in transactions or having other relationships with sanctioned entities and persons.[31]

In addition to taking various forms, sanctions can be aimed at diverse goals. They can be used to try and change existing political behaviors or policies of a target;[32] to punish targets for certain behaviors or positions;[33] to express disapproval for a target's actions;[34] or to deter targets from engaging in particular kinds of activities in the future.[35] Though some have argued that sanctions do not aim to achieve "normal" economic objectives, like resolving commercial disputes,[36] sanctions can create economic benefits and advantages for sanctioning states and their citizens.[37]

Since the end of World War II, the United States has been the most "avid" user of sanctions globally,[38] utilizing them as a key component of its foreign policy

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[28] Unlike country-based sanctions, targeted sanctions ostensibly rely not on an individual or entity's nationality but rather on the activities in which they engage. *Id*.

[29] Targeted sanctions were purportedly aimed at mitigating the adverse humanitarian effects of comprehensive country-based sanctions, as reflected in the devastating multilateral sanctions program against Iraq during the 1990s and early 2000s. Joy Gordon, *The Hidden Power of New Economic Sanctions*, 118 CURRENT HIST. 3, 4–5 (2019). The theory was that, by focusing only on "bad actors," targeted sanctions would "insulate innocents from the impacts of economic warfare." Anglin, *supra* note 25, at 698. But, as discussed below, targeted sanctions have, in fact, sometimes functioned just like comprehensive country-based sanctions—with similarly devastating consequences—for certain states. *See infra* Part IV.B.2.

[30] Office of Foreign Assets Control, *Basic Information on OFAC and Sanctions*, U.S. DEP'T OF TREASURY, https://ofac.treasury.gov/faqs/topic/1501#:~:text=U.S.%20persons%20must%20comply%20with,entities%20and%20their%20foreign%20branches [https://perma.cc/TJ3J-RQ89] (last visited July 12, 2023) (see FAQ 11, "Who Must Comply with OFAC Regulations?").

[31] Bechky, *supra* note 1, at 10.

[32] HUFBAUER ET AL., *supra* note 22, at 3.

[33] SIMONS, *supra* note 24, at 9.

[34] HUFBAUER ET AL., *supra* note 22, at 12.

[35] *Id.*

[36] *See id.* at 4 (arguing that "the normal realm of economic objectives sought in banking, commercial, and tax negotiations between sovereign states" are not part of the foreign policy goals of sanctions programs).

[37] *See infra* Part IV.B.2.

[38] MULDER, *supra* note 21, at 293.

and national security strategy.[39] During this period, U.S. sanctions have cycled between unilateral and multilateral, with a notable emphasis on unilateral sanctions programs.[40] While the U.S. government's Cold War-era sanctions mostly focused on countries, since the Cold War's end U.S. sanctions have also increasingly involved targeted sanctions against individuals and organizations.[41] Whether country-based or targeted, many contemporary U.S. sanctions programs utilize financial sanctions,[42] which target funds flowing through financial institutions and payment networks to and from sanctioned countries, entities, and individuals.[43] Whether aimed at states, other entities, or persons, U.S. sanctions can result in the freezing or "blocking" of assets—financial or otherwise—that are subject to U.S. jurisdiction and in which a sanctioned entity, person, or state has an interest.[44]

U.S. sanctions are primarily administered and enforced by the Office of Foreign Assets Control ("OFAC"), which was created in 1950 and sits within the U.S. Treasury Department.[45] In discharging its mandate, OFAC "prohibit[s] economic transactions . . . [with] targeted nations, entities, and individuals" and "freez[es] specific assets subject to agency sanctions."[46] As part of its work, OFAC maintains the Specially Designated Nationals and Blocked Persons List ("SDN list"), which contains the names of individuals and entities—known as "Specially Designated Nationals" ("SDNs")—sanctioned pursuant to country-based or

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[39] Tim Beal, *The Western Frontier: US Sanctions Against North Korea and China*, *in* SANCTIONS AS WAR: ANTI-IMPERIALIST PERSPECTIVES ON AMERICAN GEO-ECONOMIC STRATEGY 148, 153 (Stuart Davis & Immanuel Ness eds., 2022).

[40] Stuart Davis & Immanuel Ness, *Introduction: Why Are Economic Sanctions a Form of War?*, *in* SANCTIONS AS WAR: ANTI-IMPERIALIST PERSPECTIVES ON AMERICAN GEO-ECONOMIC STRATEGY 1, 16 (Stuart Davis & Immanuel Ness eds., 2022).

[41] *See* ZARATE, *supra* note 18, at 6–7. The U.S. government began using targeted sanctions against specific individuals and organizations in the 1990s. Anglin, *supra* note 25, at 698.

[42] *See* HUFBAUER ET AL., *supra* note 22, at 66–67; Carter & Farha, *supra* note 1, at 903.

[43] Carter & Farha, *supra* note 1, at 904. Financial sanctions "can have [a] wide impact because they can not only freeze financial assets and prohibit or limit financial transactions, but they also impede trade by making it difficult to pay for the export or import of goods and services." *Id.*

[44] *Id.* at 908. According to OFAC, where a property is "blocked," "[t]itle to the blocked property remains with the target, but the exercise of powers and privileges normally associated with ownership is prohibited without authorization from OFAC." Office of Foreign Assets Controls, *Basic Information on OFAC and Sanctions*, U.S. DEP'T OF TREASURY, https://ofac.treasury.gov/faqs/35 [https://perma.cc/G34R-T9HE] (last visited Sept. 6, 2023) (see FAQ 35, "Do All OFAC Programs Involve Blocking Transactions?"). Whether or not sanctions result in asset blocks depends upon the particularities of the sanctions program. Office of Foreign Assets Controls, *Blocking and Rejecting Transactions*, U.S. DEP'T OF TREASURY, https://ofac.treasury.gov/faqs/topic/1601 [https://perma.cc/3Q4H-LAHC] (last visited July 12, 2023) [hereinafter *OFAC Blocking and Rejecting Transactions*].

[45] Office of Foreign Assets Control, *Frequently Asked Questions*, U.S. DEP'T OF TREASURY, https://ofac.treasury.gov/faqs/topic/1501 [https://perma.cc/VX8N-Q3Q3] (last visited July 13, 2023). Other government departments, like the State Department and the Department of Homeland Security, also play important subsidiary roles in the U.S. sanctions regime. Carter & Farha, *supra* note 1, at 904.

[46] Jesse Van Genugten, *Conscripting the Global Banking Sector: Assessing the Importance and Impact of Private Policing in the Enforcement of U.S. Economic Sanctions*, 18 BERKELEY BUS. L. J. 136, 140 (2021).

targeted sanctions programs.[47] As of August 2023, there are thirty-eight different sanctions programs administered by OFAC.[48] Included amongst those programs are comprehensive country-based sanctions against Iran, Russia, North Korea, Syria, Cuba, and Venezuela.[49] OFAC also administers more limited sanctions programs that apply to individuals and/or entities and relate to Afghanistan, Belarus, the Central African Republic, China, the Democratic Republic of the Congo, Ethiopia, Iraq, Lebanon, Libya, Mali, Myanmar, Nicaragua, Somalia, Sudan, South Sudan, Yemen, and Zimbabwe, amongst other countries.[50] A broad array of individuals and entities must comply with these sanctions programs, including U.S. persons, "foreign entities owned or controlled by U.S. persons," "individuals or entities that import goods or services into the United States," and "foreign nationals that act *from* the United States."[51]

Before 1977, U.S. sanctions were mostly authorized under the Trading with the Enemy Act ("TWEA"),[52] a World War I-era law that was expanded over time.[53] Since 1977, the executive branch has primarily exercised its sanctions authority through another law, the International Emergency Economic Powers Act ("IEEPA"),[54] though TWEA still remains relevant.[55] To different degrees, both TWEA and IEEPA give the President broad authority to sanction other countries, entities, or individuals in times of war or national emergency.[56]

IEEPA and TWEA-related sanctions are at the heart of the private judgment enforcement suits described in this Article thanks to two other laws: the

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[47] Carter & Farha, *supra* note 1, at 905.

[48] Office of Foreign Assets Control, *Sanctions Programs and Country Information*, U.S. DEP'T OF TREASURY, https://home.treasury.gov/policy-issues/financial-sanctions/sanctions-programs-and-country-information [https://perma.cc/9JHC-FKSF] (last visited Aug. 13, 2023) [hereinafter *OFAC Sanctions Programs*].

[49] *Id.* There are debates as to whether some country-based sanctions are comprehensive or more limited. While most agree that Iran, North Korea, and Cuba are subject to comprehensive country-based sanctions, some suggest that other countries listed here, like Venezuela, are not. *E.g.*, ANDREW BOYLE, CHECKING THE PRESIDENT'S SANCTIONS POWERS: A PROPOSAL TO REFORM THE INTERNATIONAL EMERGENCY ECONOMICS POWERS ACT 7 (Brennan Center for Justice 2021), https://www.brennancenter.org/media/7754/download [https://perma.cc/DN9G-VF2G] [hereinafter *Reforming IEEPA*]. Though this Article does not weigh in on this debate, it is worth noting that even those country-based sanctions that appear limited in nature can have effects that mimic comprehensive sanctions. *See, e.g., infra* note 483.

[50] *OFAC Sanctions Programs*, *supra* note 48. Some of these sanctions programs are subject-matter focused, such as counter-terrorism related sanctions. *Id.*

[51] Van Genugten, *supra* note 46, at 143.

[52] Trading with the Enemy Act of 1917, Pub. L. No. 65-91, § 5(b), 40 Stat. 411, 415 (1917) (codified as amended at 50 U.S.C. § 4305).

[53] Benjamin Coates, *The Secret Life of Statutes: A Century of the Trading with the Enemy Act*, 1 MOD. AM. HIST. 151, 151, 156 (2018).

[54] International Emergency Economic Powers Act, Pub. L. No. 95-223, 91 Stat. 1626 (1977) (codified as amended at 50 U.S.C. § 1701 *et seq.*) [hereinafter *IEEPA Bill*]. *See infra* Part II.A for a more detailed description of IEEPA's operation.

[55] *See infra* Part II.B for a more detailed description of TWEA's operation.

[56] *See infra* Part II.A-B.

aforementioned TRIA, as well as the Iran Threat Reduction and Syria Human Rights Act ("Iran Threat Reduction Act").[57] Passed by Congress in 2002, TRIA gives private plaintiffs holding unsatisfied final judgments against terrorist actors the power to execute against the properties of those actors, their agencies, or instrumentalities, as long as the targeted properties are blocked by IEEPA or TWEA-authorized sanctions.[58] A decade after TRIA's passage, in 2012, Congress passed the Iran Threat Reduction Act.[59] Amongst other things, that Act authorizes specific plaintiffs holding judgments against Iran to execute against particular assets belonging to Iran's central bank that are blocked by an IEEPA sanctions program.[60] Because the judgment enforcement efforts described in this Article rely on either TRIA and/or the Iran Threat Reduction Act, they also necessarily depend upon IEEPA and/or TWEA sanctioned assets.

Part I presents this Article's framework for understanding the roles private actors play in sanctions programs, including through private judgments enforcement suits. In doing so, it identifies the type of private involvement those judgment enforcement efforts represent—namely, one in which private actors rely on economic sanctions to achieve their parochial, monetary interests.[61]

Part II describes the operation of and overlap between the government's primary sanctions authority (IEEPA and TWEA) and the main statutory schemes for satisfying outstanding final judgments in private terrorism cases (TRIA and the Iran Threat Reduction Act). In particular, this section demonstrates precisely how private judgment enforcement suits under TRIA and the Iran Threat Reduction Act depend upon IEEPA and/or TWEA-authorized sanctions programs. Part III explores how private judgment enforcement suits under TRIA and the Iran Threat Reduction Act can shape and even expand government sanctions, including by (1) giving private plaintiffs the chance to influence judicial interpretation of sanctions programs;[62] (2) expanding upon the largely disfavored practice of permanently confiscating the blocked assets of sanctioned states, other entities, and individuals;[63] and (3) potentially triggering new government sanctions programs and investigations.[64]

Part IV explores how judgement enforcement suits under TRIA and Iran Threat Reduction Act reinforce and exacerbate some of the most troubling consequences of U.S. sanctions, including their tendency (1) to undermine the civil rights of foreign parties with substantial connections to the United States, as well

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[57] Iran Threat Reduction and Syria Human Rights Act of 2012, Pub. L. No. 112-158, § 502, 126 Stat. 1214, 1216 (2012) (codified as amended at 22 U.S.C. § 8772) [hereinafter Iran Threat Reduction Act].
[58] *See infra* Part II.C for a more detailed description of TRIA's operation.
[59] Iran Threat Reduction Act, *supra* note 57.
[60] *See infra* Part II.D for a more detailed description of the Iran Threat Reduction Act's operation.
[61] *See infra* Part I.F.
[62] *See infra* Part I.A.
[63] *See infra* Part I.B.
[64] *See infra* Part III.C.

as U.S. nationals;[65] (2) to discriminate against Arab, Middle Eastern,[66] and Muslim individuals and entities;[67] (3) to facilitate wealth reductions in countries impacted by sanctions—which are primarily in the Global South—and generate wealth transfers to the United States;[68] and (4) to target central bank assets that are otherwise robustly protected under international law.[69]

TRIA and the Iran Threat Reduction Act have been viewed by some as vital tools of accountability for victims of terrorism and important to deterring terrorism generally.[70] Indeed, they have generally been praised for helping overcome judgment enforcement barriers facing plaintiffs with terrorism-related claims.[71] Regardless of the merits of those views, they represent an incomplete and constrained understanding of these laws. As this Article shows, TRIA and the Iran Threat Reduction Act *also* allow private plaintiffs to commandeer the government's sanctions authority for their own purposes, often exacerbating the worst effects of U.S. sanctions regimes.

In light of the increasingly critical attention being paid to U.S. sanctions,[72] it is important to understand these dynamics. In particular, this Article counsels us to appreciate suits brought under TRIA and the Iran Threat Reduction Act in light of their often problematic relationship to U.S. sanctions programs. And while remedying that relationship is beyond this Article's scope, its insights caution against expanding these judgment enforcement frameworks even further, as some in Congress have recently tried to do.[73]

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[65] *See infra* Part IV.A.

[66] I define the Middle East to include countries in North Africa and southwest Asia that are either Arab or Muslim-majority. These countries include, but are not limited to, Iran and Afghanistan.

[67] *See infra* Part IV.B.1.

[68] *See infra* Part IV.B.2.

[69] *See infra* Part IV.B.3.

[70] *See, e.g.*, Ylli Dautaj & William F. Fox, *Jurisdictional Immunities and Certain Iranian Assets: Missed Opportunities for Defining Sovereign Immunity at the International Court of Justice*, 53 CORNELL INT'L L. J. 379, 412–13 (2020) (describing the Iran Threat Reduction Act as holding Iran accountable for its support of terrorist organizations and as providing compensation to victims of terrorism); Debra M. Strauss, *Enlisting the U.S. Courts in a New Front: Dismantling the International Business Holdings of Terrorist Groups Through Federal Statutory and Common-Law Suits*, 38 VAND. J. TRANSNAT'L L. 679, 738–39 (2005) (describing statutes relating to civil terrorism suits, including TRIA, as "discourag[ing] the financing of terrorist acts" and providing accountability to victims of terrorism).

[71] *E.g.*, Strauss, *supra* note 70, at 734–35.

[72] *E.g.*, Karam Shaar & Said Dimashqi, *U.S. Sanctions on Syria Aren't Working. It's Time for a New Sanctions Approach that Minimizes Humanitarian Suffering and Increases Leverage*, ATL. COUNCIL (Jan. 13, 2023), https://www.atlanticcouncil.org/blogs/menasource/us-sanctions-on-syria-arent-working-its-time-for-a-new-sanctions-approach-that-minimizes-humanitarian-suffering-and-increases-leverage/ [https://perma.cc/NF2G-CN5P]; Robin Wright, *Why Sanctions Too Often Fail*, NEW YORKER, Mar. 7, 2022, https://www.newyorker.com/news/daily-comment/why-sanctions-too-often-fail [https://perma.cc/NE72-96YM].

[73] Most recently, congressional legislation has been introduced that would extend TRIA's reach to sanctioned Russian assets. While the State Department is typically responsible for designating state sponsors of terrorism, Congress is currently considering a bill that would designate Russia as

I. THE ROLE OF PRIVATE ACTORS IN ECONOMIC SANCTIONS

While "non-state actors have been neglected in the study of sanctions . . . ,"[74] history shows that states have not been alone in using economic pressure tactics against their adversaries. Even before the modern sanctions system emerged after World War I,[75] civil society actors were also using economic strategies to achieve political ends.[76] Organized by political and social movements, these private, punitive measures were often aimed against "foreign oppressors or moral injustices."[77]

Since that pre-modern time, private involvement in sanctions has only increased in scope. This section presents a framework for understanding some of the different ways private actors participate in modern sanctions regimes both in the United States and elsewhere.[78] In doing so, it mines a nascent, but growing literature—dispersed across various areas and disciplines—that has documented the role of non-state actors in economic sanctions.[79] Informed by this literature, this section identifies several ways in which private actors participate in economic sanctions. These forms of private involvement, which can overlap, include: (1) participating in privately-led boycotts; (2) justifying and lobbying for sanctions; (3) resisting sanctions; (4) enforcing sanctions out of legal obligation; and (5) enforcing

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a state sponsor of terror in response to its invasion of Ukraine. Russia is a State Sponsor of Terrorism Act, H.R. 3979, 118th Cong. (2023), https://www.congress.gov/bill/118th-congress/house-bill/3979/text/ih?overview=closed&format=txt [https://perma.cc/35P7-PDTW]. If the bill becomes law, Russia could be sued under Section 1605A of the Foreign Sovereign Immunities Act. Plaintiffs who obtain Section 1605A judgments against Russia would then be able to use TRIA to seize Russian assets frozen by U.S. sanctions. Since Russia's invasion of Ukraine in February 2022, the U.S. government has placed numerous sanctions on Russia, including against Russian central bank funds. CORY WELT, CONG. RSCH. SERV., IN11869, RUSSIA'S WAR AGAINST UKRAINE: OVERVIEW OF U.S. SANCTIONS AND OTHER RESPONSES 1–3 (last updated Dec. 20, 2022), https://crsreports.congress.gov/product/pdf/IN/IN11869 [https://perma.cc/94ES-NSWE].

[74] Youngwan Kim & Taehee Whang, *Non-governmental Organizations and Economic Sanctions*, 39 INT'L POL. SCI. REV. 209, 211 (2018).

[75] MULDER, *supra* note 21, at 18.

[76] *Id.*

[77] *Id.* An example of these pre-modern, private measures is the campaign of economic coercion led by Irish civil society against Britain in the late 1800s in response to British colonial practices in Ireland. *See infra* note 83 and accompanying text.

[78] While this section is primarily focused on the United States, it also shows how private involvement in sanctions is a global phenomenon.

[79] *See, e.g.*, Mirijam Koch, *The Power of Coalitions: Lobbying Success in US Sanctions Policy Toward Iran from 2007 to 2016*, 12 INT. GRPS. & ADVOC. 237 (2023) (exploring how private groups lobby government legislatures for sanctions); Francesco Giumelli & Michal Onderco, *States, Firms, and Security: How Private Actors Implement Sanctions, Lessons Learned from the Netherlands*, 6 EUR. J. INT'L SEC. 190 (2021) (exploring the role of for-profit actors in implementing sanctions policies, with a focus on Dutch corporations). Other literature addresses private involvement in sanctions implicitly or incidentally alongside other topics. *See, e.g.*, MULDER, *supra* note 21, at 18.

sanctions voluntarily.[80] To different extents, these forms of private involvement can occur in the sanctioning state, the sanctioned state, or third-party states and can be independent of or taken in concert with states and intergovernmental organizations.

This section discusses these five forms of private sanctions involvement, in turn. It ends by describing how private efforts to fulfill unsatisfied terrorism-related civil judgments represent a sixth way in which private actors participate in economic sanctions—namely by relying on those sanctions to further their parochial, monetary interests. This tees up the remainder of this Article.

A. Boycotts

Boycotts are perhaps one of the oldest and most pervasive ways in which private actors have traditionally been involved in economic coercion. While they can also be used for domestic political purposes,[81] boycotts have been defined as "[t]he participation of the population of a state in matters of foreign policy by means of refusal of commercial intercourse, in particular of purchase of goods coming from a foreign state charged with an unfriendly attitude . . . ."[82] The term "boycott" was first used in the late 1800s to describe economic pressure campaigns by political activists in Ireland opposed to British imperialist practices in the country.[83]

As a tool of foreign policy, boycotts can have various aims. First, they can be utilized to pressure governments or multilateral institutions to adopt sanctions. The anti-apartheid boycott movement against the South African government is one prominent example of this practice. That boycott was started in the 1950s by the African National Congress—a South African political movement—as a largely domestic effort that was one part of a multi-pronged strategy to end South African apartheid.[84] When the boycott movement first began, there were few state-led sanctions against South Africa.[85] Over the course of several decades, however, the

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[80] This list does not purport to be complete. There may be other ways private actors participate in sanctions that remain obscure or for which there is little publicly available information. Indeed, the hope is that this list will be supplemented and expanded by future research and inquiry.

[81] Corinna Mullin, *Settler Colonialism, Imperialism and Sanctions from Below: Palestine and the BDS Movement*, *in* SANCTIONS AS WAR: ANTI-IMPERIALIST PERSPECTIVES ON AMERICAN GEO-ECONOMIC STRATEGY 360, 366–67 (Stuart Davis & Immanuel Ness eds., 2022).

[82] Hersch Lauterpatcht, *Boycott in International Relations*, 14 BRIT. Y.B. INT'L L. 125, 126 (1933). While boycotts can also be pursued by state actors, this sub-part focuses on boycotts instituted by non-state groups. SIMONS, *supra* note 24, at 8.

[83] ROBBIE MCVEIGH & BILL ROLSTON, IRELAND, COLONIALISM, AND THE UNFINISHED REVOLUTION 124-25 (2021).

[84] Jesse Bucher & Stuart Davis, *Boycott Sanctions as Tactics in the South African Anti-Apartheid Movement*, *in* SANCTIONS AS WAR: ANTI-IMPERIALIST PERSPECTIVES ON AMERICAN GEO-ECONOMIC STRATEGY 345, 346–48 (Stuart Davis & Immanuel Ness eds., 2022).

[85] *Id.* at 355–56.

anti-apartheid boycott grew into an international movement[86] and, eventually, helped prompt state-led sanctions against South Africa's apartheid government.[87]

Second, foreign policy-focused boycotts can support or supplement governmental or intergovernmental sanctions. For example, a few days before the start of the Russian invasion of Ukraine on February 24, 2022, the U.S. government and other states began to institute various sanctions against Russia, which have since increased in size and scope.[88] Alongside these and other sanctions, individuals, groups, and institutions in predominantly Western countries have independently boycotted Russian goods, sports teams, and even individual Russians who have failed to condemn their country's actions.[89]

Finally, private boycotts can fill gaps where governments or multilateral institutions are unable or unwilling to implement sanctions. Historically, many of these boycotts have been part of grassroots anti-colonial and/or anti-racist movements.[90] For example, at the start of Japan's aggressive war against China in the early 1930s, members of the U.S. government were divided over whether to institute economic sanctions against Japan.[91] While the United States ultimately did not sanction Japan for its actions in China,[92] a group of civil society actors created the American Boycott Association in the early 1930s to encourage private, voluntary boycotts of Japanese products in the United States.[93] Similarly, during World War I, various business groups in neutral European countries joined together to launch private boycotts against Germany, filling gaps left by the failure of their countries to sanction the German state due to neutrality laws in effect at the time.[94] More recently, while most states and multilateral institutions have resisted

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[86] *Id.* at 346; Mullin, *supra* note 81, at 364.
[87] In particular, the anti-apartheid boycott movement has been credited with pushing Congress to pass the U.S. Comprehensive Anti-Apartheid Act of 1986, which prohibited certain imports from, exports to, and investments in South Africa. Bucher & Davis, *supra* note 84, at 346; *See generally* Kenneth A. Rodman, *Public and Private Sanctions Against South Africa*, 109 POL. SCI. Q. 322 (1994).
[88] Richard Martin, *Sanctions Against Russia—A Timeline*, S&P GLOB. MKT. INTEL. (Sept. 18, 2023), https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/sanctions-against-russia-8211-a-timeline-69602559 [https://perma.cc/KJZ8-W2CU] [hereinafter *Russia Sanctions Timeline*].
[89] Emma Bowman, *Boycotts of Russian Products and Groups Spread, But the Effects May Be Limited*, NAT'L PUB. RADIO: WNYC (Feb. 28, 2022), https://www.npr.org/2022/02/28/1083385057/boycotts-russian-effects [https://perma.cc/T96N-A48Z]. International companies that have continued to operate in Russia since the invasion have also been subject to boycotts. *Mondelez 'Singled Out' in Boycott over Russia Business: Executive*, REUTERS (June 16, 2023), https://www.reuters.com/business/retail-consumer/mondelez-singled-out-boycott-over-russia-business-memo-2023-06-16/ [https://perma.cc/JK2Y-T2KE] (describing boycotts instituted against a snack company that continued to sell its products in Russia following the Ukraine invasion).
[90] Mullin, *supra* note 81, at 364–66.
[91] MULDER, *supra* note 21, at 183–84.
[92] *Id.* at 187.
[93] *Id.*
[94] *Id.* at 35.

sanctioning Israel for its innumerable, long-standing violations of Palestinian rights,[95] the Boycott, Divestment, and Sanctions movement has stepped into the breach and mobilized numerous individuals, companies, and institutions to engage in boycotts of Israel.[96]

B. Justifying and Lobbying for Sanctions

Beyond instituting boycotts, private actors can provide information to justify sanctions and/or directly lobby for sanctions to be imposed by states or inter-governmental organizations.

NGOs have played a particularly prominent role—whether intentionally or not—in justifying sanctions regimes. For example, as some have shown, human rights reports created by prominent Western NGOs, like Human Rights Watch and Amnesty International, have been used by governments and inter-governmental organizations to justify sanctions against particular states, entities, and individuals.[97] Given the "independent and unbiased" reputation of these NGOs, the reports they create can be "decisive for [sanctioning] states to apply economic coercion to non-compliant target[s] . . . ."[98]

At times, these NGOs have leveraged their own reports, as well as their accumulated expertise, to directly lobby for sanctions—particularly in the form of multilateral or targeted sanctions.[99] Recent examples of these NGO-led sanctions calls include efforts to institute multilateral human rights and anti-corruption sanctions against Chinese officials for their actions against the Uyghur minority group,[100] as well as efforts to sanction certain Afghan officials for alleged war crimes and human rights abuses.[101] Other private entities have exploited their organizational strength and financial contributions to lawmakers to successfully

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[95] Yara Hawari, Opinion, *There Is No Good Reason Why Israel Should Not be Under Sanctions*, AL JAZEERA ENGLISH (June 26, 2021), https://www.aljazeera.com/opinions/2021/6/26/there-is-no-good-reason-why-israel-should-not-be-under-sanctions [https://perma.cc/CWV7-78N7].
[96] Mullin, *supra* note 81, at 360, 361, 366; *BDS Movement Call, July 9, 2005*, *in* THE CASE FOR SANCTIONS AGAINST ISRAEL 29–31 (Audrea Lim ed., 2012).
[97] Immanuel Ness, *Transnational Allies of Sanctions: NGO Human Rights Organizations' Role in Reinforcing Economic Oppression*, *in* SANCTIONS AS WAR: ANTI-IMPERIALIST PERSPECTIVES ON AMERICAN GEO-ECONOMIC STRATEGY 91, 97 (Stuart Davis & Immanuel Ness eds., 2022).
[98] *Id.*
[99] *Id.* at 91, 94, 101.
[100] *Freedom House Urges Canada, UK, to Join Global Magnitzsky Sanctions Against Chinese Officials Violating the Rights of Uyghurs*, FREEDOM HOUSE (Aug. 18, 2020), https://freedomhouse.org/article/freedom-house-urges-canada-uk-join-global-magnitsky-sanctions-against-chinese-officials [https://perma.cc/4Z8V-TZTJ].
[101] *Human Rights Watch Calls for Sanctions Against New Afghan Defense Minister*, REUTERS (Jan 13, 2019), https://www.reuters.com/article/us-afghanistan-rights/human-rights-watch-calls-for-sanctions-against-new-afghan-defense-minister-idUSKCN1P70GI [https://perma.cc/F752-SPDP].

lobby for sanctions, as well.[102] As studies have shown, private groups like these have played a particularly important role in pushing Congress to sanction Iran.[103]

C. Resisting Sanctions

In addition to justifying and advocating for sanctions, private actors can play an important role in resisting sanctions programs. Sometimes these resistance efforts are encouraged by the sanctioned state itself. For example, in Italy in the 1930s, Benito Mussolini's government mobilized the public to resist sanctions levied by the League of Nations in response to Italy's invasion of Ethiopia.[104] As part of its anti-sanctions policy, the Italian government called upon women to turn "'every Italian family into a fortress of resistance'"[105] and donate their wedding rings and jewelry to the state.[106]

Sometimes, private actors have independently engaged in acts of sanctions resistance. Most recently, a transnational group of activist, advocates, jurists, and scholars joined together to launch a movement challenging the U.S. government's global sanctions practices. Known as the *International People's Tribunal on U.S. Imperialism: Sanctions, Blockades, and Economic Coercive Measures*, the movement is "a first ever international effort" by civil society actors to "interrogate sanctions . . . from the perspective of those most impacted by them, namely the peoples of Asia, Africa, and South America."[107] The movement's aim is "to build systems of accountability—rooted in global cross-movement solidarity—both within and outside of the law, to challenge the violence of imperialism through sanctions."[108] As part of its work, the movement held hearings throughout 2023 on the negative impact of U.S. sanctions on social, political, economic, and ecological issues in various countries from Latin America, Africa, and Asia.[109]

D. Enforcing Sanctions Out of Legal Obligation

Sometimes private actors can be legally obligated to implement and enforce sanctions. Much like boycotts, this is one of the most common forms of private participation in sanctions-based economic coercion. Indeed, when it comes to U.S.

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[102] *See* Koch, *supra* note 79, at 242 (describing a private group's organizational strength and financial contributions to legislatures as relevant to its success in lobbying for or against sanctions policies).
[103] *Id.* at 255.
[104] MULDER, *supra* note 21, at 234.
[105] *Id.*
[106] *Id.*
[107] *Opening Event*, INT'L PEOPLE'S TRIBUNAL ON U.S. IMPERIALISM, https://sanctionstribunal.org/opening-event/ (last visited Aug. 27, 2023) [https://perma.cc/JGV2-6XZZ].
[108] *Id.*
[109] *About*, INT'L PEOPLE'S TRIBUNAL ON U.S. IMPERIALISM, https://sanctionstribunal.org/about/ (last visited Aug. 27, 2023) [https://perma.cc/Y77E-EPL3].

sanctions, the enforcement burden has typically fallen mostly on the private sector, especially since IEEPA's passage.[110]

This has been particularly true for the global financial industry, many of whose members must comply with U.S. sanctions[111] thanks to the extraterritorial reach of those laws.[112] For example, financial institutions subject to U.S. jurisdiction that receive property belonging to a sanctioned entity or individual must, depending upon the circumstances, either block that property or reject the transaction.[113] These institutions must then file a report with OFAC about the transaction within ten business days of the blocking or rejection.[114] Fearful of Treasury Department fines,[115] financial institutions often have internal policies and compliance measures to facilitate the enforcement of U.S. sanctions and reporting of violations to OFAC.[116]

Legally mandated private enforcement is especially critical where a sanctions regime is extensive and complex. For instance, because of resource and informational constraints, OFAC is incapable of enforcing the vast array of U.S. sanctions laws on its own.[117] By contrast, in the aggregate, global financial institutions have both the resources[118] and information to enforce sanctions violations, which are often dependent on internal transactional data produced by those firms.[119]

E. Voluntary Enforcement of Sanctions

At times, private actors enforce sanctions regimes voluntarily, separate from any legal obligation. These individuals or entities may be incentivized by various factors to act as sanctions enforcers, including by the prospect of monetary

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[110] EVA NANOPOULOS, THE JURIDIFICATION OF INDIVIDUAL SANCTIONS AND THE POLITICS OF EU LAW 229 (2019).
[111] Van Genugten, *supra* note 46, at 137.
[112] *See id.* at 158 (noting that "OFAC regulation is well and truly global" and that "[e]ven the most attenuated connections to the U.S. market can suffice for OFAC jurisdiction"). Contributing to the expansive reach of U.S. sanctions, civil enforcement of these laws is often governed by a strict liability regime, effectively requiring financial institutions to "rout out misconduct even if those institutions have no direct culpability in [the] financing of blocked entities or individuals." *Id.* at 159; *Reforming IEEPA*, *supra* note 49, at 10.
[113] Carter & Farha, *supra* note 1, at 908. *See infra* note 390 for a description of the difference between blocking and rejecting a transaction.
[114] 31 U.S.C. § 501.603-604; Carter & Farha, *supra* note 1, at 908.
[115] In 2021 alone, OFAC's penalties and settlement agreements totaled nearly $21 million. *2021 Enforcement Information*, U.S. DEP'T OF TREASURY, https://home.treasury.gov/policy-issues/financial-sanctions/civil-penalties-and-enforcement-information/2021-enforcement-information [https://perma.cc/6PRD-EXPT].
[116] Van Genugten, *supra* note 46, at 137–38.
[117] *Id.* at 158–59.
[118] *See id.* at 158 (noting that the number of compliance personnel at individual financial institutions is vastly greater than the number of OFAC employees).
[119] *Id.* at 158–59.

gain or by the business risks associated with certain transactions. These voluntary enforcement efforts are often indirect and/or incidental to these other aims.

One example of private voluntary enforcement—which I have explored in other work—involves parties bringing claims under the ATA's private right of action, Section 2333. In pursuit of large monetary awards for their terrorism-related injuries, plaintiffs have used Section 2333 to incidentally enforce certain U.S. sanctions laws against defendants.[120]

Driven by business interests, other actors, like financial institutions, have also voluntarily and indirectly enforced sanctions. As one former Treasury Department official has described it, "without express governmental mandates or requirements," these institutions have "grown acutely sensitive to the business risks attached to illicit financial activity and [have] taken significant steps to bar it from their institutions."[121] This includes refusing to engage in business transactions with suspicious individuals or entities,[122] as well as exiting from certain regions broadly targeted by sanctions programs.[123]

Sometimes private voluntary enforcement can occur when sanctions are imminent but not yet official. For example, Shell plc, a British energy and oil corporation, ended its equity partnerships with Russian energy company, Gazprom, only a few days after Russia's invasion of Ukraine and without any government sanction directly forcing its hand.[124] Less than two weeks later, U.S. sanctions hit the Russian energy sector.[125] In all likelihood, Shell's decision to leave Russia was a pre-emptive measure based on its assessment that the Russian energy sector would imminently be sanctioned and the associated business risks that entailed. Indeed, Shell was one of several Western companies that voluntarily exited the Russian market only days after the invasion because of the evolving "geopolitical and sanctions situation."[126]

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[120] Jamshidi, *supra* note 19, at 758–59. Section 2333 plaintiffs have done this by using underlying violations of U.S. sanctions as the basis for their Section 2333 suits. *Id.*
[121] ZARATE, *supra* note 18, at 10.
[122] *Id.*
[123] This practice of exiting an entire region, which is known as de-risking, is discussed in Part IV.B.2.
[124] Press Release, Shell plc, *Shell Intends to Exit Equity Partnerships Held with Gazprom Entities* (Feb. 28, 2022), https://www.shell.com/media/news-and-media-releases/2022/shell-intends-to-exit-equity-partnerships-held-with-gazprom-entities.html [https://perma.cc/CC62-NZZR].
[125] The first major energy-related sanctions against Russia—from the United States—came on March 8, 2022. Press Release, White House, Fact Sheet: United States Bans Imports of Russian Oil, Liquified Natural Gas, and Coal (Mar. 8, 2022), https://www.whitehouse.gov/briefing-room/statements-releases/2022/03/08/fact-sheet-united-states-bans-imports-of-russian-oil-liquefied-natural-gas-and-coal/ [https://perma.cc/7DQM-8HHN]; *Russia Sanctions Timeline*, *supra* note 88.
[126] William Boston, Alistair MacDonald & Jenny Strasburg, *Western Companies Pull Back from Russia in Response to Ukraine Invasion, Sanctions*, WALL ST. J. (Feb. 28, 2022), https://www.wsj.com/articles/western-companies-pull-back-from-russia-in-response-to-ukraine-invasion-sanctions-11646067812 [https://perma.cc/ZKU8-QPHG].

F. Relying on Sanctions to Further Private, Monetary Interests

Private judgment enforcement efforts under the Terrorism Risk Insurance Act and the Iran Threat Reduction Act represent yet another way in which private parties are involved in sanctions regimes. While these efforts can also fit into some of the other categories mentioned thus far,[127] private judgment enforcement suits underscore a particular kind of relationship between the private sector and sanctions—namely, one in which private parties depend upon sanctions to further their own parochial, monetary interests.

As the rest of this Article demonstrates, judgment enforcement suits under TRIA and the Iran Threat Reduction Act are intimately dependent upon and tied to the U.S. government's sanctions architecture. The next part of this Article, Part II, describes the relationship between TRIA, the Iran Threat Reduction Act, and certain U.S. sanctions authorities and demonstrates how terrorism plaintiffs are able to use U.S. sanctions to attach and execute on assets, where they would otherwise likely be unable to fulfill their outstanding monetary judgments.[128] Part III explores how TRIA and the Iran Threat Reduction Act also give private plaintiffs the opportunity to influence and even expand the reach of U.S. sanctions. Finally, Part IV demonstrates how private judgment enforcement efforts under TRIA and the Iran Threat Reduction Act support some of the most problematic practices and policies associated with U.S. sanctions. While not explored in this Article, the dynamics discussed in Parts III and IV may be reflected in the other categories of private sanctions involvement described earlier in Part I.[129]

II. PRIVATE JUDGMENT ENFORCEMENT AND U.S. SANCTIONS: THE INTERSECTION

This section describes the operation and relationship between certain U.S. sanctions authorities and the federal statutes providing private judgment enforcement opportunities in terrorism-related cases. This public-private

[127] Of the five other types of private participation in sanctions, suits under TRIA and the Iran Threat Reduction Act align most with category five—the voluntary enforcement of U.S. sanctions. By pursuing blocked assets, these suits make targeted individuals and entities "pay" both for their alleged involvement in terrorist activities, as well as for violating U.S. sanctions. In this way, TRIA and Iran Threat Reduction Act suits not only indirectly enforce sanctions laws; they also reinforce some of the legal and policy effects of U.S. sanctions regimes. *See infra* Part IV. That being said, these private judgement enforcement suits also highlight a particular kind of relationship between private actors and sanctions that is neither essential nor necessary to voluntary enforcement—namely the connection between plaintiffs' private monetary interests and the existence of U.S. sanctions regimes.

[128] *See infra* notes 143–46 and accompanying text.

[129] While this Article focuses exclusively on the ways TRIA and Iran Threat Reduction Act suits influence and reinforce sanctions policies, other categories of private sanctions involvement may create similar effects. For example, by lobbying for sanctions, private parties can have a significant impact on the contours of a sanctions program. Similarly, private parties that enforce sanctions—whether under legal obligation or voluntarily—can influence the meaning and scope of those sanctions, while also exacerbating their negative effects.

intersection is primarily composed of four laws—the International Emergency Economic Powers Act, the Trading with the Enemy Act, the Terrorism Risk Insurance Act, and the Iran Threat Reduction Act.

On the public sanctions side, IEEPA and TWEA are the two most relevant and important statutes. While Congress has also passed legislation sanctioning particular states, entities, and individuals or modifying existing sanctions regimes,[130] most U.S. sanctions are authorized under IEEPA with TWEA playing a subsidiary but still important role. Together, these two statutes give the President extensive and nearly unchecked authority to institute sanctions programs in times of war and national emergency.

On the private judgment enforcement side, TRIA and The Iran Threat Reduction Act are the primary federal laws used by plaintiffs to enforce their outstanding, terrorism-related judgments. Those underlying judgements have typically been based on tort suits brought under either the ATA's private right of action, Section 2333, or the FSIA's terrorism exception, Section 1605A[131] and its predecessor statute, 28 U.S.C. § 1605(a)(7) ("Section 1605(a)(7)").[132] Under Section 2333, plaintiffs can bring either a claim for primary liability, under 18 U.S.C. § 2333(a) ("Section 2333(a)"),[133] or a claim for secondary liability, under 18 U.S.C. § 2333(d) ("Section 2333(d)"),[134] for acts of international terrorism that

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[130] Masters, *supra* note 24.
[131] While, as discussed below, Iran Threat Reduction Act claims are limited to certain cases involving the FSIA terrorism exception, plaintiffs have used other federal laws—beyond the ATA and FSIA provisions—to bring the underlying terrorism-related claims enforced through TRIA. These include the Alien Tort Statute, 28 U.S.C. § 1350, and the Torture Victims Protection Act, 28 U.S.C. § 1350. Jamshidi, *supra* note 19, at 743–44 n. 26. Though less common, some plaintiffs have also used TRIA to enforce terrorism-related suits based on state law tort claims—as reflected in the pending TRIA litigation against Afghanistan's central bank. *See* Third Amended Complaint ¶¶ 401–21, *In re: Terrorist Attacks on September 11, 2001*, No. 1:03-cv-09848 (S.D.N.Y. June 23, 2010), ECF No. 263 (raising various state law tort claims against the Taliban); *infra* note 373 (describing a TRIA writ of execution filed by the *Havlish* plaintiffs, who were part of in *In re: Terrorist Attacks on September 11*, against Afghanistan's central bank in fulfillment of a default judgment against the Taliban). This Article focuses on underlying claims involving Sections 2333 or 1605A and does not address other federal or state law bases for terrorism judgments enforced through TRIA.
[132] In 2008, Section 1605A replaced Section 1605(a)(7), which was the FSIA's original provision for suing state sponsors of terrorism. Jamshidi, *supra* note 19, at 778 n. 229.
[133] Under Section 2333(a), "[a]ny national of the United States injured in his or her person, property, or business by reason of an act of international terrorism, or his or her estate, survivors or heirs, may sue [responsible individuals or entities] therefor in any appropriate district court of the United States . . . ." 18 U.S.C. § 2333(a).
[134] Under Section 2333(d)

> In an action under [Section 2333(a)] for an injury arising from an act of international terrorism committed, planned, or authorized by an organization that had been designated as a foreign terrorist organization. . . as of the date on which such act of international terrorism was committed, planned, or authorized, liability may be asserted as to any person who aids and abets, by knowingly

cause personal injury or death. Typically, Section 2333 cases have been brought against the terrorist group that allegedly committed the act of international terrorism and/or against third-parties, like banks, that allegedly provided material support[135] to the terrorist group or to individuals or entities allegedly affiliated with the group.[136]

As for Section 1605A, it creates a terrorism exception under the Foreign Sovereign Immunities Act—which is a comprehensive statute that protects foreign sovereigns from civil litigation in U.S. courts subject to certain carve outs.[137] Under Section 1605A, countries designated by the State Department as state sponsors of terrorism[138] lose their immunity and may be sued by private parties for personal injury or death resulting from the state's participation in various terrorism-related crimes.[139] Using Section 1605A, plaintiffs have typically brought claims against state sponsors of terrorism for providing material support, such as funding or

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> providing substantial assistance, or who conspires with the person who committed such an act of international terrorism.

18 U.S.C. § 2333(d)(2).

[135] Under federal law, material support includes:

> [A]ny property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (1 or more individuals who may be or include oneself), and transportation, except medicine or religious materials.

18 U.S.C. § 2339A(b)(1).

[136] Jamshidi, *supra* note 19, at 759, 765, 831 n. 521. While Section 2333(a) cases can be brought against terrorist groups that committed the act of violence, as well as against third-parties, Section 2333(d) cases are typically only brought against third parties, as those suits involve either aiding-and-abetting or conspiracy claims. *Id.*

[137] Maryam Jamshidi, *The Political Economy of Foreign Sovereign Immunity*, 73 HASTINGS L. J. 585, 587 (2022).

[138] *See infra* note 189 for a discussion of the State Department's process for designating state sponsors of terrorism.

[139] Section 1605A is both a jurisdictional and substantive law—it gives U.S. courts the authority to hear cases against state sponsors of terrorism and also provides an independent federal cause of action for those claims. Jamshidi, *supra* note 19, at 778. Under Section 1605A's jurisdictional provision, "[a] foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case . . . in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act if such act or provision of material support or resources is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency." 28 U.S.C. § 1605A(a). Under 1605A's substantive provision, "[a] foreign state that is or was a state sponsor of terrorism . . . and any official, employee, or agent of that foreign state while acting within the scope of his or her office, employment, or agency, shall be liable . . . for personal injury or death caused by acts described in [the jurisdictional] subsection . . . of that foreign state, or of an official, employee, or agent of that foreign state, for which the courts of the United States may maintain jurisdiction under this section for money damages." 28 U.S.C. § 1605A(c).

training, to terrorist groups or activities.[140] While Section 2333 claims can only be brought by or on behalf of U.S. citizens,[141] claims under Section 1605A can be raised by or on behalf of "1) a national of the United States, (2) a member of the armed forces, or (3) [] an employee of the Government of the United States, or of an individual performing a contract awarded by the United States Government, acting within the scope of the employee's employment."[142]

TRIA and the Iran Threat Reduction Act give plaintiffs with judgments under Sections 2333 and 1605A the ability to seize assets subject to U.S. sanctions. Without those sanctions regimes—which are typically authorized by IEEPA but sometimes by TWEA—plaintiffs would likely have few to no assets to execute against.[143] This is because Section 2333 and 1605A suits target terrorist groups and state sponsors of terrorism that often fail to enter appearances or otherwise defend themselves in these cases; that are otherwise absent from the United States; and/or that have few assets in the country as a matter of course.[144] Those assets that *are* subject to U.S. jurisdiction are often blocked by U.S. sanctions.[145] TRIA and the

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[140] Jamshidi, *supra* note 19, at 778.
[141] *See supra* notes 133–34.
[142] 28 U.S.C. § 1605A(a)(2)(A)(ii).
[143] As mentioned below, certain terrorism victims can take advantage of victims funds established by Congress. *See infra* notes 197–99, 501 and accompanying text. That being said, TRIA and the Iran Threat Reduction Act give a wider-range of victims the ability to collect on their terrorism-related injuries.
[144] As I have previously discussed, state sponsors of terrorism typically do not enter appearances in Section 1605A cases and have few, if any, assets to execute against in the United States that are not already sanctioned. Jamshidi, *supra* note 19, at 790–91 n. 290. The same situation typically holds for Section 2333 cases involving defendant terrorist organizations that also often fail to enter appearances and have few to any assets in the United States that are not blocked by sanctions. For example, in the Section 2333 case of *Rubin v. Hamas-Islamic Resistance Movement*, Hamas—a resistance organization designated as a terrorist group by the State Department and subject to U.S. sanctions—did not enter an appearance in the case and likely had no assets in the United States and certainly none that were unconstrained by U.S. sanctions for plaintiffs to execute against. No-civ-02-0975, 2004 WL 2216489 (Sept. 27, 2004). Many Section 2333 plaintiffs have attempted to avoid these problems by suing third-party defendants with deep-pockets, like banks, who *do* enter appearances and are likely to pay judgments issued against them. Maryam Jamshidi, *How the War on Terror Is Transforming Private Law*, 96 WASH U. L. REV. 559, 619 (2018). Those cases have, however, largely failed to translate into monetary awards for plaintiffs—further highlighting the importance of TRIA and the Iran Threat Reduction Act to the monetary goals of terrorism plaintiffs. *Id.* at 620.
[145] *See* OFAC, *Terrorist Assets Report Calendar Year 2020: Twenty-Ninth Annual Report to the Congress on Assets in the United States Relating to Terrorist Countries and Organizations Engaged in International Terrorism*, Ex. A & Table 1, U.S. Dep't of Treasury, https://ofac.treasury.gov/media/912651/download?inline [https://perma.cc/5EZ2-HUFF] (listing OFAC-blocked assets of designated terrorists and state sponsors of terrorism); John F. Murphy, *Civil Liability for the Commission of International Crimes as an Alternative to Criminal Prosecution*, 12 HARV. HUM. RTS. J. 1, 45 (1999) (describing challenges facing plaintiffs attempting to enforce Section 1605(a)(7) judgments against the assets of state sponsors of terrorism in the 1990s, including challenges related to the fact many of those assets were subject to U.S. sanctions and therefore unavailable for attachment at the time).

Iran Threat Reduction Act make it possible for plaintiffs to execute on those otherwise sanctioned assets that are generally unavailable to litigants.[146]

This section describes the operation of IEEPA, TWEA, TRIA, and the Iran Threat Reduction Act, in turn. While these statutes are complex and nuanced, not every complexity and nuance is reflected here. Instead, this part focuses on those aspects of each statute that are necessary to understanding either its basic operation or its relationship to the other statues discussed in this section.

A. International Emergency Economic Powers Act (IEEPA)

Enacted in 1977, IEEPA is the single most important statutory basis for U.S. sanctions.[147] Under IEEPA, the President has broad authority to regulate economic transactions and control property in which a foreign country or its nationals have an interest. IEEPA—which is codified, as amended, at 50 U.S.C. § 1701 *et seq*—empowers the President to:

> (A) investigate, regulate, or prohibit:
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> (i) any transactions in foreign exchange,
> (ii) transfers of credits or payments between, by, through, or to any banking institutions, to the extent that such transfers or payments involve any interest of any foreign country or national thereof,
> (iii) the importing or exporting of currencies or securities; and
>
> (B) investigate, block during the pendency of an investigation, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national therefor has any interest by any person, or with respect to any property, subject to the jurisdiction of the United States . . . .[148]

In order to exercise her authority under IEEPA, the President must declare a national emergency aimed at "deal[ing] with . . . [an] unusual and extraordinary threat, which has its source in whole or substantial part outside the United States,

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[146] *See infra* note 214 and accompanying text for the default rule generally prohibiting judgement enforcement efforts against sanctioned assets.

[147] Van Genugten, *supra* note 46, at 152; Congressional Research Service*, The International Emergency Economic Powers Act: Origins, Evolution, and Use*, 17 (2020) https://sgp.fas.org/crs/natsec/R45618.pdf [https://perma.cc/35PW-Z3YM] [hereinafter *CRS IEEPA Report*].

[148] 50 U.S.C. § 1702.

to the national security, foreign policy, or economy of the United States . . . ."[149] As long as the threat originates at least in "substantial part outside the United States," IEEPA places no limits on who or what can be targeted by sanctions.[150] Indeed, IEEPA sanctions can target both foreign nationals with no connections to the United States and U.S. persons.[151] Even if U.S. persons are not themselves targeted, IEEPA sanctions—like other U.S. sanctions regimes—prohibit U.S. persons, as well as those subject to U.S. jurisdiction, from engaging in any transaction with sanctioned individuals or entities.[152]

Notably, there are procedural limitations on the President's IEEPA powers. For example, "in every possible instance," the President shall consult with Congress before exercising her powers under the statute.[153] Once the President utilizes IEEPA, she is required to immediately submit a report to Congress with specific information about how those powers have been used.[154] Thereafter, the President is required to report to Congress at least once every six months detailing the actions she has taken under IEEPA and any changes to information she previously furnished to Congress.[155]

While in passing IEEPA Congress may have intended otherwise,[156] these ostensible limitations on presidential power have been less than meaningful.[157] For example, IEEPA does not define what constitutes an "unusual and extraordinary threat" that triggers the statute, giving the President wide latitude in making such determinations.[158] Relatedly, while IEEPA encourages the President to consult with Congress before declaring a national emergency, the statute does not require such consultation.[159] Even when consultation does happen, it need not be extensive or have any impact on the President's policy-making.[160] Finally, while IEEPA's congressional reporting requirement is mandatory, it places few limits on the President's powers, as those reports can be "[no] more substantial than the statements and reports issued routinely by the White House."[161]

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[149] 50 U.S.C. § 1701(a). To declare a national emergency, the President must follow the processes and procedures laid out in the National Emergencies Act ("NEA"). 50 U.S.C. § 1601 *et seq* (2022).
[150] *Reforming IEEPA*, *supra* note 49, at 7.
[151] *Id.*
[152] *Id.* at 8.
[153] 50 U.S.C. § 1703(a).
[154] *Id.* at § 1703(b).
[155] *Id.* at § 1703(c).
[156] *See infra* note 174 and accompanying text.
[157] Barry Carter, *International Economic Sanctions: Improving the Haphazard U.S. Legal Regime*, 75 CALIF. L. REV. 1159, 1235 (1987).
[158] Neil Kinkopf, *The Statutory Commander in Chief*, 81 INDIANA L.J. 1169, 1176 (2006).
[159] Carter, *supra* note 157, at 1235. Congress can terminate the President's IEEPA authorities by passing a joint resolution ending the relevant NEA emergency, though that power is circumscribed by the President's ability to veto any such resolution. *Reforming IEEPA*, *supra* note 49, at 6.
[160] Carter, *supra* note 157, at 1235.
[161] *Id.*

As a result of these dynamics, the President enjoys broad powers under IEEPA.[162] As one commentator describes it, "there are no effective limits on the President's invoking IEEPA for dubious national emergencies, and no effective way to terminate the statute's use when it becomes inappropriate with the passing of time."[163] Indeed, while Congress envisioned that IEEPA would be used for emergencies that "are by their nature rare and brief,"[164] the typical IEEPA emergency lasts for an average of ten years—and is increasing.[165] In effect, IEEPA has become a routine foreign policy tool used by presidents in situations that Congress arguably did not authorize or contemplate, including in circumstances where no emergency actually threatens the United States or where the emergency "do[es] not appear likely to disappear anytime soon . . . ."[166]

B. Trading with the Enemy Act (TWEA)

IEEPA exists alongside TWEA, which was passed in 1917 in the midst of World War I. Before IEEPA's passage, TWEA was the main authority for U.S. sanctions[167] and was primarily used to restrict trade with countries hostile to the United States.[168] Even today, it remains an important part of the U.S. government's sanctions architecture.

Much like IEEPA, under TWEA—which is codified, as amended, at 50 U.S.C. § 4301 *et seq*—the president may:

> (A) investigate, regulate, or prohibit, any transactions in foreign exchange, transfers of credit or payments between, by,

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[162] *Id.* at 1241.
[163] *Id.* at 1242.
[164] House Committee on In'tl Rel., Trading with the Enemy Act Reform Legislation, H.R. Rep. No 95-549 at 10 (1977).
[165] *Reforming IEEPA*, *supra* note 49, at 11.
[166] *Id.* One example of IEEPA's problematic application is President Donald Trump's decision to use the statute against certain foreign persons working with or supporting the International Criminal Court ("ICC"). In June 2020, Trump declared a national emergency in response to ICC investigations into activities purportedly undertaken by U.S. personnel and certain U.S. allies. Exec. Order 13,928, 85 Fed. Reg. 36139 (June 11, 2020). Amongst other things, Trump used that emergency to block the properties of covered foreign persons—including ICC personnel investigating U.S. or U.S. allied officials—under IEEPA. *Id.* at § 1. Trump's actions were highly criticized and eventually overturned by the Biden administration. *See, e.g.*, *U.S. Sanctions International Criminal Court Prosecutor*, HUMAN RIGHTS WATCH (Sept. 2, 2020), https://www.hrw.org/news/2020/09/02/us-sanctions-international-criminal-court-prosecutor [https://perma.cc/F2LR-54KZ] ("The Trump administration's unprecedented imposition of asset freezes on prosecutors at the International Criminal Court . . . shows an egregious disregard for victim's of the world's worst crimes . . . ."); Exec. Order 14,022, 86 Fed. Reg. 17895 (Apr. 1, 2021) (order from Biden administration terminating Trump's national emergency with respect to the ICC, as well as related IEEPA sanctions, and noting that "the threat and imposition of financial sanctions against the Court, its personnel, and those who assist it are not an effective or appropriate strategy for addressing the United States' concerns with the ICC").
[167] *CRS IEEPA Report, supra* note 147, at Summary.
[168] Anglin, *supra* note 25, at 703.

> through, or to any banking institution, and the importing, exporting, hoarding, melting, or earmarking of gold or silver coin or bullion, currency or securities, and
>
> (B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest,
>
> by any person, or with respect to any property, subject to the jurisdiction of the United States . . . .[169]

As originally promulgated, TWEA was a wartime authority only.[170] It gave the President broad powers to "investigate, regulate, and prohibit" all financial, property, and trade-related transactions involving foreign nations, their nationals, or residents during times of war.[171] Then, in 1933, Congress amended the statute to allow presidents to use TWEA not only during wartime but also "during any other period of national emergency declared by the President."[172] Armed with this expansive authority, Presidents used TWEA to exert their authority over economic transactions with foreign states, their nationals, and residents during times of war *and* national emergency up until the 1970s.[173]

Then, in 1977, Congress stepped in to limit TWEA's extensive grant of presidential power.[174] It did so in several ways. This included amending the statute to ensure it could only be used during wartime.[175] Congress also passed IEEPA to separately govern presidential sanctions power during national emergencies and, as mentioned earlier, placed guardrails on those authorities.[176] In fact, however, the "authorities granted to the President . . . [by] IEEPA [were] essentially the same as

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[169] 50 U.S.C. § 4305(b)(1).
[170] Coates*, supra* note 53, at 160.
[171] Trading With the Enemy Act [TWEA], *supra* note 52, at § 5(b); Benjamin Coates, *A Century of Sanctions, Origins: 13 Current Events in Historical Perspectives* 7 (2020), https://origins.osu.edu/article/economic-sanctions-history-trump-global?language_content_entity=en [https://perma.cc/NDY6-Q9B8].
[172] Emergency Banking Relief Act, P.L. 73-1, 48 Stat. 1, CH. 1, § 2 (Mar. 9, 1933); *CRS IEEPA Report*, *supra* note 147, at 4–5. This amendment to TWEA also gave the President unlimited authority to declare whether a national emergency existed under the statute. *CRS IEEPA Report*, *supra* note 147, at 5.
[173] Regan v. Wald, 468 U.S. 222, 227 (1984); *CRS IEEPA Report*, *supra* note 147, at 6.
[174] *CRS IEEPA Report*, *supra* note 147, at 6–8.
[175] *IEEPA Bill, supra* note 54, at § 101(a); *CRS IEEPA Report*, *supra* note 147, at 9. As part of its overhaul of TWEA, Congress passed the NEA. *CRS IEEPA Report*, *supra* note 147, at 8. After its passage, the NEA became the sole basis for presidential declarations of national emergencies, placing procedural limitations on that power that had been absent from TWEA. *Id*.
[176] *IEEPA Bill, supra* note 54, at Title II; *CRS IEEPA Report*, *supra* note 147, at 9.

those in . . .TWEA," even though the "conditions and procedures for their exercise are different."[177]

As currently enacted, TWEA sanctions can apply both to non-U.S. persons and to U.S. nationals as long as they qualify as "enemies" or "allies of enemies"—both of which are defined terms under the statute.[178] Amongst other things, TWEA prohibits persons inside the United States from engaging in trade with such enemies or allies of enemies, while also prohibiting persons—including non-U.S. persons outside the United States—from engaging in certain other transactions involving U.S. territory with enemies or their allies.[179]

Because TWEA can only be used during wartime, it has been invoked less frequently than IEEPA as a basis for U.S. sanctions.[180] Still, TWEA remains an important source of presidential sanctions authority and, together with IEEPA, serves as the "principal statutory bedrock" for U.S. sanctions.[181] A grandfather clause ensures that TWEA-based sanctions enacted before July 1, 1977 remain in effect, as long as they are renewed by the President.[182]

C. Terrorism Risk Insurance Act (TRIA)

Congress passed TRIA in the wake of 9/11. While it was primarily intended to establish a temporary federal insurance program for certain losses resulting from terrorism,[183] TRIA also created a scheme for plaintiffs to collect on particular kinds of unsatisfied, terrorism-related civil judgments.[184] Specifically, under Section 201 of TRIA, which is codified, as amended, at 28 U.S.C. § 1610 note, plaintiffs with final judgments against a "terrorist party on a claim based upon an act of terrorism

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[177] Regan, 468 U.S. at 228.
[178] Under TWEA, an enemy is defined, in part, as "[a]ny individual, partnership, or other body of individuals, *of any nationality*, resident within the territory . . . of any nation with which the United States is at war, or resident outside the United States and doing business within such territory, and any corporation incorporated within such territory of any nation with which the United States is at war or incorporated within any country other than the United States and doing business within such territory." 50 U.S.C. § 4302 (emphasis added). An "ally of an enemy" is defined, in part, as "[a]ny individual, partnership, or other body of individuals, *of any nationality*, resident within the territory . . . of any nation which is an ally of a nation with which the United States is at war, or resident outside the United States and doing business within such territory, and any corporation incorporated within such territory of such ally nation, or incorporated within any country other than the United States and doing business within such territory." *Id.* (emphasis added).
[179] 50 U.S.C. § 4303(a)–(b).
[180] Anglin, *supra* note 25, at 703.
[181] Van Genugten, *supra* note 46, at 140.
[182] *IEEPA Bill, supra* note 54, at § 101(b). Cuba is the only country still sanctioned under TWEA. Helen Yaffe, *US Sanctions Cuba 'to Bring About Hunger, Desperation and the Overthrow of the Government,' in* SANCTIONS AS WAR: ANTI-IMPERIALIST PERSPECTIVES ON AMERICAN GEO-ECONOMIC STRATEGY 129, 132 (Stuart Davis & Immanuel Ness eds., 2022).
[183] CONG. RSCH. SERV., TERRORISM RISK INSURANCE: OVERVIEW AND ISSUE ANALYSIS FOR THE 116TH CONGRESS 1 (2019).
[184] *See* TRIA, *supra* note 9, at § 201.

or for which a terrorist party is not immune under [Section 1605A of the FSIA or its predecessor statute]" can execute against or attach in aid of execution the blocked assets of that terrorist party, including the blocked assets of its agencies or instrumentalities,[185] to satisfy their compensatory damages.[186]

Under TRIA, a "terrorist party" includes individual terrorists, terrorist organizations—including but not limited to those formally designated by the State Department as Foreign Terrorist Organizations[187] ("FTOs")—[188] as well as state sponsors of terrorism.[189] As a result of this expansive definition, TRIA judgment enforcement suits are available to plaintiffs holding unsatisfied judgments against non-state actors, under statutes like Section 2333 of the ATA, as well as against state sponsors of terrorism sued under Section 1605A of the FSIA or its predecessor statute, Section 1605(a)(7). Those holding judgments against state sponsors of terrorism qualify on that basis alone to bring TRIA claims.[190] For those holding judgments against non-state terrorist parties, they must also establish that their claim is based on an "act of terrorism"—a broadly defined term under TRIA.[191]

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[185] As described below, an agency or instrumentality of a terrorist party need not be named in the underlying judgment to be subject to a TRIA judgment enforcement suit. *See infra* note 306 and accompanying text.

[186] TRIA, *supra* note 9, at § 201(a). TRIA does not cover punitive damages awards. Hegna v. Islamic Rep. of Iran, 402 F.3d 97, 99 (2d Cir. 2005).

[187] *See infra* note 423 and accompanying text for a description of the State Department's process for designating FTOs.

[188] In addition to FTOs and other organizations designated as terrorist groups by the U.S. government, TRIA can be used to collect on judgments against "terrorist organizations" that satisfy the more expansive definition for those groups found in immigration law. TRIA, *supra* note 9, at § 201(d) (citing to 8 U.S.C. § 1182(a)(3)(B)(vi)). For example, using TRIA, plaintiffs can execute on the assets of a "terrorist party," even if it has not been designated as a terrorist group by the U.S. government, as long as it is "a group of two or more individuals whether organized or not, which engages in, or has a subgroup that engages in activities" including but not limited to "solicit[ing] funds or other things of value for . . . 'a terrorist activity' . . . [or] 'a terrorist organization' . . . ". 8 U.S.C. § 1182(a)(3)(B)(vi); 8 U.S.C. § 1182(a)(3)(B)(iv).

[189] The Secretary of State has authority to designate countries as "state sponsors of terrorism" where she determines that the country is "for purposes of section 6(j) of the Export Administration Act of 1979 . . . section 620A of the Foreign Assistance Act of 1961 . . . section 40 of the Arms Export Control Act (22 U.S.C. 2780), or any other provision of law . . . a government that has repeatedly provided support for acts of international terrorism." 28 U.S.C. § 1605A(h)(6). While TRIA is limited to designations made pursuant to the Arms Export Control Act and the Foreign Assistance Act, that authority is clearly co-extensive with the Secretary's designation authority under Section 1605A. *See* TRIA, *supra* note 9, at § 201(d)(4).

[190] *See* TRIA, *supra* note 9, at § 201(a).

[191] *Id.* TRIA defines an "act of terrorism" as either an act certified as such by the Secretary of Treasury or one that qualifies as "terrorist activity" under immigration law provision 8 U.S.C. § 1182(a)(3)(B)(iii). *Id.* at §201(d)(1). Under the immigration law provision, terrorist activity is defined as any act unlawful under the laws of the place where it occurred or which, if it had been committed in the United States, would be unlawful under U.S. law and that involves any one of several enumerated acts, which include but are not limited to: "[t]he seizing or detaining, and threatening to kill, injure, or continue to detain, another individual in order to compel a third person . . . to do or abstain from doing any act as an explicit or implicit condition for the release of the individual seized or detained"; "the hijacking or sabotage of any conveyance [like an aircraft]"; or "assassination." 8 U.S.C. § 1182(a)(3)(B)(iii).

TRIA is not the first scheme aimed at using sanctioned assets to help terrorism plaintiffs collect on their outstanding judgments. Indeed, on several occasions, Congress tried but largely failed to help terrorism judgement holders use sanctioned properties to satisfy their damages awards—particularly those holding judgments against state sponsors of terrorism. These congressional efforts included an earlier amendment to the FSIA (added in 1998) that is codified at 28 U.S.C. § 1610(f) ("Section 1610(f)")[192] and that TRIA was partially modeled after.[193] As originally promulgated, Section 1610(f) allowed plaintiffs with judgments under the FSIA terrorism exception to execute against assets that belonged to a state sponsor of terrorism, its agencies, or instrumentalities and that were subject to sanctions—including TWEA and IEEPA-authorized programs.[194] Ultimately, because of a presidential waiver provision included in the statute, Section 1610(f) proved to be toothless and never went into effect.[195]

With Section 1610(f) largely defunct, and at the urging of FSIA terrorism plaintiffs,[196] Congress passed another statute in 2000 aimed at using sanctioned assets to help terrorism judgment holders: the Victims of Trafficking and Violence Protection Act ("VTVPA").[197] The VTVPA made certain assets of particular state

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[192] As amended, Section 1610(f) provides, in part, that "[n]otwithstanding any other provision of law . . . any property with respect to which financial transactions are prohibited or regulated pursuant to section 5(b) of the [TWEA] . . . section 620(a) of the Foreign Assistance Act of 1961 . . . sections 202 and 203 of the [IEEPA] . . . or any other proclamation, order, regulation, or license issued pursuant thereto, shall be subject to execution or attachment in aid of execution of any judgment relating to a claim for which a foreign state (including any agency or instrumentality of such state) claiming such property is not immune under section 1605(a)(7) . . . or section 1605A." 28 U.S.C. § 1610(f)(1)(A). Before Section 1610(f)'s passage, plaintiffs with judgments under Section 1605A's predecessor statute had to rely on other more limited FSIA provisions to attach the property of state sponsors of terrorism. Under one of those still-existing provisions, the U.S.-based property of a foreign sovereign used for commercial activity can be attached as long as the foreign sovereign is a state sponsor of terrorism and regardless of whether the property "is or was involved with the act upon which the claim is based." 28 U.S.C. § 1610(a)(7) ("Section 1610(a)(7)"). Under another older but still-existing provision, plaintiffs can attach the U.S.-based property of a foreign sovereign's agency or instrumentality, as long as it is not immune under the FSIA's terrorism exception and has engaged in commercial activity in the United States, regardless of whether the property "is or was involved with the act upon which the claim is based." 28 U.S.C. § 1610 (b)(3) ("Section 1610(b)(3)"). These provisions have ultimately been of little value to plaintiffs both because state sponsors of terrorism, their agencies, and instrumentalities often have few properties—let alone those used for commercial purposes—in the United States and because those assets that are available are often blocked pursuant to U.S. sanctions regulations and cannot be attached under those provisions. *See supra* notes 144–45.

[193] *See* Heiser v. Islamic Rep. of Iran, 735 F.3d 934, 939 (D.C. Cir. 2013) [hereinafter *Heiser II*].

[194] *See* Omnibus Consolidated and Emergency Supplemental Appropriations Act, Pub. L. 105-277, 112 Stat. 2681 (1998).

[195] Section 1610(f) contains a provision authorizing the President to issue a blanket waiver in the "interest of national security" to prevent all execution efforts pursuant to the statute. 28 U.S.C. § 1610(f)(3). Immediately after Section 1610(f)'s passage, President Bill Clinton issued that waiver, which remains in effect. Presidential Determination No. 2001–03, 63 Fed. Reg. 59,201 (Oct. 21, 1998); *Heiser II*, 735 F.3d at 939.

[196] Strauss, *supra* note 70, at 731.

[197] Victims of Trafficking and Violations Protection Act, Pub. L. No. 106-386, 114 Stat. 1464, § 2002 (2000).

sponsors of terrorism—blocked pursuant to either IEEPA or TWEA[198]—available to compensate FSIA terrorism plaintiffs, but otherwise provided a much narrower compensation scheme as compared to Section 1610(f).[199] The VTVPA's[200] inadequacies soon led to calls for "equal access for all U.S. victims of state-sponsored terrorism who have secured judgments and awards in federal courts . . ."[201] TRIA was passed, in part, to achieve that goal.[202]

In addition to extending execution efforts to a much broader range of terrorism-related civil suits than those covered either by Section 1610(f) or the VTVPA, TRIA specifically aimed to overcome existing limitations on executing against sanctioned properties. Indeed, TRIA's drafters were very clear that Section 201 was intended to "deal comprehensively with the problem of enforcement of judgments issued to victims of terrorism in any U.S. court by enabling them to satisfy such judgments from the *frozen assets* of terrorist parties . . . [and] establish[ing], once and for all, that such judgments are to be enforced against *any assets* available in the U.S., and that the executive branch has no statutory authority to defeat such enforcement under standard judicial processes, except as expressly provided in this act."[203]

While remedying problems with earlier judgment enforcement efforts,[204] TRIA also adopted a similar approach to those efforts by targeting assets blocked by IEEPA and TWEA. Under TRIA, a "blocked asset" is defined as "any asset seized or frozen by the United States under . . . [the] Trading With the Enemy Act

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[198] *Id.* at § 2002(b)(1).
[199] The VTVPA is limited in scope for two reasons. First, it applies only to plaintiffs with final judgements against Cuba and Iran in particular cases filed on or before specific dates. *Id.* at § 2002(a)(2)(A). In total, the VTVPA applies to only eleven suits under Section 1605(a)(7). Strauss, *supra* note 70, at 731–32. Second, the VTVPA is not a judgment enforcement scheme, but rather a victims fund administered by the U.S. government that makes relatively limited use of blocked properties to compensate plaintiffs. *See* VTVPA, *supra* note 197, at § 2002(b)(1)–(2).
[200] As part of Section 2002 of the VTVPA, Congress also modified Section 1610(f) of the FSIA, but kept the provision's presidential waiver clause. VTVPA, *supra* note 197, at § 2002(f). The same day he signed the VTVPA into law, President Clinton exercised his waiver authority under Section 1610(f) again. Statement by the President on HR 3244 10/28/00 (Oct. 28, 2000), 2000 WL 1617225, at *5. As with Clinton's first Section 1610(f) waiver, this waiver has not been rescinded. In re Terrorist Attacks on Sept. 11, 2001, 2022 WL 4643442, at *13 (S.D.N.Y. Aug. 26, 2022).
[201] Strauss, *supra* note 70, at 734.
[202] 148 CONG. REC. S11524-01, 528 (daily ed. Nov. 19, 2002) (statement of Sen. Tom Harkin).
[203] *Id.* (emphasis added). This reference to the executive's "statutory authority to defeat" enforcement was a reference to President Clinton's use of Section 1610(f)'s broad waiver provision. *See* Conference Report on H.R. 3210, Terrorism Risk Protection Act, 148 CONG. REC. H8722-06, 28 (Nov. 13, 2002) (noting that Section 201 of TRIA aims to eliminate the presidential waiver invoked under Section 1610(f) by "making clear that all such [terrorism-related] judgments are enforceable against any assets or property under any authorities referenced in [Section 1610(f)]"). Under TRIA, the President still has the power to issue a waiver where it is in the "national security interest" to prevent a blocked asset from being attached, but only on an "asset-by-asset basis" and only with respect to certain kinds of diplomatic properties. TRIA, *supra* note 9, at § 201(b)(1)–(2).
[204] *See supra* note 195 and accompanying text.

. . . or under . . . the International Emergency Economic Powers Act."[205] In general, the asset in question *must* be blocked pursuant to TWEA or IEEPA—rather than some other sanctions authority—in order to be subject to TRIA attachment.[206]

Notwithstanding its close relationship to IEEPA and TWEA, TRIA is not fully co-extensive with those regimes. For example, TRIA explicitly exempts diplomatic properties used exclusively for diplomatic or consular purposes from execution,[207] even though such properties can and have been blocked by U.S. sanctions.[208] In addition, IEEPA and TWEA can reach properties that have more tenuous ties to sanctioned individuals and entities than is required under TRIA.[209] For example, under U.S. sanctions regulations, the government can block properties in which the sanctioned individual or entity has "any interest whatsoever, direct or indirect, present, future or contingent,"[210] including interests that are "short of full ownership."[211] By contrast, according to some (though not all) courts, to execute against blocked assets under TRIA,[212] plaintiffs must demonstrate that the terrorist party, its agencies, or instrumentalities *legally own* the property in question.[213]

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[205] *See* TRIA, *supra* note 9, at § 201(d)(2). As confirmed by the Supreme Court, TRIA's immunity stripping extends to the blocked properties of "foreign central bank[s] or monetary authorit[ies] held for [their] own account," which are otherwise largely immune from execution and attachment under the FSIA. *See* Bank Markazi v. Peterson, 578 U.S. 212, 217 n.2 (2016).
[206] *See* Stansell v. Revolutionary Armed Forces of Cuba, 704 F.3d 910, 914–17 (11th Cir. 2013) [hereinafter *Stansell II*]. Usually, TRIA cannot be used against an asset blocked pursuant to a sanctions authority other than IEEPA or TWEA. *Id.* In 2018, however, Congress amended Section 2333 of the ATA to explicitly allow plaintiffs with claims under that statute to attach assets, using TRIA, that are blocked under the Kingpin Act. Anti-Terrorism Clarification Act of 2018, Pub. L. No. 115-253, 132 Stat. 3183 (2018); Caballero v. Fuerzas Armadas Revolucionarias de Columbia, 2019 WL 13222189, slip op. at *5 (D.S.D. July 11, 2019). The Kingpin Act, which targets the assets of foreign narcotics traffickers, is distinct from both IEEPA and TWEA. *Stansell II*, 704 F.3d at 917. Exploring TRIA's relationship to and impact on the Kingpin Act is beyond this Article's scope.
[207] TRIA, *supra* note 9, at § 201(d)(2)(B).
[208] *See, e.g.*, Exec. Order 12,170, 44 Fed. Reg. 65,729 (Nov. 14, 1979) (IEEPA-based sanctions blocking all property, including embassy and other diplomatic properties, belonging to Iran in United States).
[209] Estate of Heiser v. Islamic Republic of Iran, 885 F.Supp.2d 429, 439–40 (D.D.C. 2012), *aff'd sub nom*, 735 F.3d 934 (D.C. Cir. 2013) [hereinafter *Heiser I*].
[210] OFAC, *Additional Questions from Financial Institution: 95. Does a financial institution have the obligation to screen account beneficiaries for compliance with OFAC regulations?*, U.S. DEP'T OF TREASURY, https://home.treasury.gov/policy-issues/financial-sanctions/faqs/95 [https://perma.cc/KE7Z-QU9G] (last visited Aug. 13, 2023). *See also Heiser I*, 735 F.3d at 439 (noting that, under its regulations, "OFAC apparently may block a transaction involving an indirect, intangible, future, contingent interest of a sanctioned state, entity, or individual of any nature whatsoever").
[211] OFAC, *Terrorist Assets Report, Calendar Year 2007: Sixteenth Annual Report to Congress on Assets in the United States Relating to Terrorist Countries and Organizations Engaged in International Terrorism*, U.S. DEP'T OF TREASURY, https://ofac.treasury.gov/media/8461/download?inline [https://perma.cc/D9SA-9MWN] [hereinafter *OFAC 16th Asset Report*].
[212] *See, infra* Part III.A.2.
[213] *See Heiser I*, 735 F.3d at 439–40.

Notwithstanding these points of divergence, the power enjoyed by TRIA plaintiffs to execute against sanctioned assets is an extraordinary one under U.S. law. Indeed, pursuant to OFAC regulations, judgment creditors are typically barred from attaching blocked assets, unless they have an OFAC license.[214] Section 201 of TRIA is an exception to that rule,[215] making it a formidable tool for certain kinds of plaintiffs holding outstanding monetary judgments.[216]

D. Iran Threat Reduction Act

Much like TRIA, the Iran Threat Reduction Act was passed to address a particular challenge facing plaintiffs holding terrorism-related money judgments. Like TRIA, it also targets assets blocked by U.S. sanctions. Unlike TRIA, however, the Iran Threat Reduction Act focuses on particular classes of plaintiffs and blocked assets.[217] Specifically, it allows plaintiffs in *Peterson v. Islamic Republic of Iran*—a case involving various claims against Iran under Section 1605A's predecessor statute—to execute against assets belonging to Iran's central bank, Bank Markazi,

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[214] Doe v. JP Morgan Chase Bank, N.A., 899 F.3d 152, 156 (2d Cir. 2018); *OFAC 16th Asset Report*, *supra* note 211.

[215] *JP Morgan Chase Bank*, 899 F.3d at 156.

[216] Where Section 1605A claims are concerned, TRIA is the most effective avenue for most plaintiffs—whose enforcement actions are generally limited to the FSIA's attachment provisions—to attach the assets of judgment debtors. As already noted, this is true vis-à-vis attachment provisions added to the FSIA before TRIA was passed. *See supra* note 192. It is also true vis-à-vis attachment provisions added to the FSIA more recently. Indeed, a few years after TRIA's passage, Congress amended the FSIA to create yet another enforcement avenue for plaintiffs with judgments against state sponsors of terrorism. *See* National Defense Authorization Act for Fiscal Year 2008, 122 Stat. 341, § 1083. That legislation created Section 1610(g) of the FSIA, which allows plaintiffs with judgments under the FSIA's terrorism exception to execute on properties of agencies or instrumentalities of state sponsors of terrorism, even if those entities are juridically separate from the state sponsor and regardless of the level of control, involvement, or financial benefit enjoyed by the state sponsor vis a vis those entities. 28 U.S.C. § 1610(g). As the Supreme Court recently held, however, Section 1610(g) does not create its own independent grounds for execution and, instead, only identifies properties available for execution to satisfy a Section 1605A judgment. *See* Rubin v. Islamic Republic of Iran, 138 S.Ct. 816, 820 (2018). In other words, for Section 1610(g) to apply, the property in question must be stripped of immunity pursuant to another FSIA attachment provision relating to state sponsor defendants. This usually means either TRIA or the other FSIA attachment provisions passed before TRIA must apply. Even under Section 1610(g), then, plaintiffs' greatest chance of success is usually for the asset in question to be subject to TRIA and, therefore, blocked by U.S. sanctions.

[217] Iran Threat Reduction Act, *supra* note 57, at § 502.

in fulfillment of default judgements against Iran[218] reaching into the billions of dollars.[219]

Before the Iran Threat Reduction Act's passage, the *Peterson* plaintiffs had tried for several years to attach Bank Markazi's assets. Their efforts began in June 2008, when they filed a writ of execution against those properties.[220] The writ was issued against an account held by Clearstream—a financial institution based in Luxembourg—at Citibank, N.A. in New York.[221] Until early 2008, Clearstream's Citibank account was undisputedly maintained "on behalf of" Bank Markazi and used as a correspondent account to process transactions, including interest payments, related to over $2 billion in bonds held by Bank Markazi in its account at Clearstream's Luxembourg headquarters.[222] In February 2008, Clearstream transferred the entirety of Bank Markazi's bonds to another account opened at Clearstream's Luxembourg office by an Italian bank, known as UBAE.[223] From that point on, proceeds from the bonds, which were generated in the Citibank correspondent account, were paid to UBAE, which would then transfer them to Bank Markazi.[224] In executing against the Citibank account, the *Peterson* plaintiffs

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[218] As originally promulgated, the Iran Threat Reduction Act applied only to the *Peterson* attachment proceeding that began in 2008 in the U.S District Court for the Southern District of New York. *See* Iran Threat Reduction Act, *supra* note 57, at § 502. In 2019, Congress expanded the statute codifying the Iran Threat Reduction Act—22 U.S.C. § 8772 ("Section 8772")— to include another *Peterson* attachment suit brought in 2013, after the Iran Threat Reduction Act was passed. *See* National Defense Authorization Act for Fiscal Year 2020, Pub. L. 116-92, 133 Stat. 1198, § 1226 (Dec. 20, 2019) (amendment to Iran Threat Reduction Act applying statute to second *Peterson* attachment proceeding filed in 2013 in U.S. District Court for the Southern District of New York). The 2013 suit was brought by substantially the same but not identical plaintiffs as the 2008 *Peterson* attachment proceeding. *See* Peterson v. Islamic Republic of Iran, 876 F.3d 63, 71 (2d Cir. 2017) *judgment vacated by* Clearstream Banking S.A. v. Peterson, 140 S.Ct. 813 (2020) (detailing relationship between two *Peterson* judgment enforcement suits). Because the second *Peterson* attachment litigation—which focused on an account held at JP Morgan in New York allegedly on Bank Markazi's behalf—came after the Iran Threat Reduction Act's passage, it is not discussed in this section. *Id.* at 89.

[219] As reflected in the *Peterson* attachment proceeding that began in 2008, plaintiffs held default judgments against Iran totaling several billions of dollars. *See* Writ of Execution at 13, Peterson v. Islamic Republic of Iran, (1:10-cv-04518) (S.D.N.Y. June 12, 2008) (noting that *Peterson* plaintiffs held default judgments against Iran in amount of $2,656,944,877).

[220] *Id.* Plaintiffs subsequently issued several other new and amended writs. Peterson v. Islamic Republic of Iran, 2013 WL 1155576, at *5 (S.D.N.Y. Mar. 13, 2013). Initially, plaintiffs only knew the "Iranian government had a beneficial interest" in the assets they were targeting. Defendant Bank Markazi's Memorandum of Law in Support of Its Motion to Dismiss the Amended Complaint for Lack of Subject Matter Jurisdiction at 4, Peterson v. Islamic Republic of Iran, (1:10-cv-04518) (S.D.N.Y. May 11, 2011) [hereinafter *Bank Markazi's Motion to Dismiss the Amended Complaint*]. As noted below, in 2010, plaintiffs learned that the Iranian government entity holding that interest was Bank Markazi. *See infra* note 395.

[221] Peterson, 2013 WL 1155576, at *2; *About Clearstream*, CLEARSTREAM, https://www.clearstream.com/clearstream-en/about-clearstream [https://perma.cc/G9LK-5T2T] (last visited July 9, 2023).

[222] Peterson, 2013 WL 1155576, at *2–3.

[223] *Id.* at *3; *Bank Markazi's Motion to Dismiss the Amended Complaint*, *supra* note 220, at 35.

[224] Peterson, 2013 WL 1155576 at *4.

argued that proceeds in that account still belonged to Bank Markazi, with the bond transfer to UBAE purportedly serving as an attempt to evade U.S. regulators and Iran's judgment creditors.[225]

In support of their early execution efforts against the Citibank account, the *Peterson* plaintiffs invoked Section 201 of TRIA, amongst other grounds.[226] There was, however, far from a clear path to execution for plaintiffs.[227] Amongst other issues, there were questions as to whether Bank Markazi had a sufficient property interest in the Citibank account to trigger TRIA.[228] There was also an issue as to whether the Citibank funds were immune from execution pursuant to an FSIA provision prohibiting attachment of central bank assets.[229]

To ensure the *Peterson* plaintiffs could overcome these and other potential hurdles and seize the assets in question, Congress passed Section 502 of the Iran

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[225] Plaintiffs' Memorandum of Law in Opposition to Bank Markazi's Motion to Dismiss the Second Amended Complaint at *7–9, Peterson v. Islamic Republic of Iran, No. 1:10-cv-04518, (S.D.N.Y May 15, 2012).

[226] *Bank Markazi's Motion to Dismiss the Amended Complaint*, *supra* note 220, at 12 n.7. Plaintiffs also invoked the FSIA's alternative attachment provisions as a basis for their execution efforts. In particular, plaintiffs argued that Bank Markazi's assets were subject to execution both under Section 1610(a)(7) of the FSIA, because they were assets of a state sponsor of terrorism in the United States used for commercial activity, and under an immunity waiver provision generally available to all FSIA plaintiffs, because Iran had purportedly waived the immunity of those assets. *Id.* at 1415; Second Amended Complaint ¶¶ 174–75, Peterson v. Islamic Republic of Iran, 10-civ-4518, (S.D.N.Y Mar. 19, 2012) [hereinafter *Peterson Second Amended Complaint*].

[227] This was particularly true prior to February 2012 when President Barack Obama issued an executive order that blocked the assets of Iran's central bank. *See infra* note 244 and accompanying text. As described below, plaintiffs' TRIA claim was on shaky ground before that time, as Iran's central bank assets were not clearly blocked pursuant to any U.S. sanctions regimes. *See infra* notes 396–97 and accompanying text. Even after Bank Markazi's assets were blocked in February 2012, there were still questions as to whether TRIA could be used against those assets. *See infra* notes 228–29 and accompanying text.

[228] In responding to plaintiffs' TRIA claim after the Obama administration blocked the bank's assets, Bank Markazi argued that the assets in the Citibank correspondent account still did not satisfy TRIA because they were not technically "assets of"—in other words, were not owned by—Bank Markazi, as TRIA arguably required. According to the bank, it did not own the assets, pursuant to New York law, because the assets held at Citibank were "Clearstream's entitlements vis-à-vis Citibank" and not legally owned by Bank Markazi. Defendant Bank Markazi's Memorandum of Law in Support of Its Motion to Dismiss the Second Amended Complaint for Lack of Subject Matter Jurisdiction at * 11–12, Peterson v. Islamic Republic of Iran, 10-civ-4518, (S.D.N.Y Mar. 15, 2012) [hereinafter *Bank Markazi Motion to Dismiss Second Amended Complaint*]. As discussed below, while the case law is convoluted, most courts seem to agree that blocked assets must be *legally owned* by the terrorist party in question, or its agencies or instrumentalities, in order to be subject to TRIA. *See infra* notes 290–93 and accompanying text.

[229] Peterson, 2013 WL 1155576, at *25. Under the FSIA, and subject to certain exceptions, property that is "of a foreign central bank or monetary authority held for its own account" is immune from execution. 28 U.S.C. § 1611(b)(1). As mentioned earlier, the Supreme Court has since held that TRIA overcomes this central bank immunity. *See supra* note 205.

Threat Reduction Act,[230] which became law in August 2012.[231] That section, which is codified, as amended, at 22 U.S.C. § 8772, applies "notwithstanding any other provision of law, including any provision of law relating to sovereign immunity."[232] It specifically and exclusively applies to "the financial assets that are identified in and the subject of proceedings in the United States District Court for the Southern District of New York in *Peterson et al. v. Islamic Republic of Iran et al* . . . that were restrained by restraining notices and levies secured by the plaintiffs in those proceedings."[233] It allows plaintiffs to execute against those assets "to satisfy any judgment to the extent of any compensatory damages awarded against Iran for damages for personal injury or death caused by . . ."[234] violations of the FSIA terrorism exception.[235]

Before execution can be effected, the Iran Threat Reduction Act requires a judicial determination that the assets in question are:

> (A) held by or for a foreign securities intermediary doing business in the United States;
>
> (B) a blocked asset (whether or not subsequently unblocked), or an asset that would be blocked if the asset were located in the United States, that is property [subject to litigation in the *Peterson* case],[236] and
>
> (C) equal in value to a financial asset of Iran, including an asset of the central bank or monetary authority of the Government of Iran or any agency or instrumentality of that Government, that such foreign securities intermediary or a related intermediary holds abroad . . . .[237]

Under the Iran Threat Reduction Act, the court must also determine "whether Iran

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[230] Petition for Writ of Certiorari, Bank Markazi v. Peterson, 2014 WL 7463968 (No. 14-770), at *9–10.

[231] President Obama signed the Iran Threat Reduction Act into law on August 10, 2012. Iran Threat Reduction Act, *supra* note 57, at § 502.

[232] 22 U.S.C. § 8772(a)(1).

[233] *Id.* at § 8772(b).

[234] *Id.* at § 8772(a)(1)(C). As this statutory language makes clear, the Iran Threat Reduction Act—much like TRIA—only applies to compensatory damages and does not cover punitive damages awards.

[235] *Id*. at § 8772(a)(1). The Iran Threat Reduction Act does not eliminate or exclude any other bases for execution under the FSIA or TRIA. Peterson, 2013 WL 1155576, at *9.

[236] This language—about property that would be blocked if it was present in the United States—was subsequently added to the Iran Threat Reduction Act by amendments made in 2019 and may have been included to help some *Peterson* plaintiffs reach Bank Markazi assets held abroad. National Defense Authorization Act for Fiscal Year 2020, § 1226, *supra* note 218; *see* Peterson, 876 F.3d at 87–95 (2d. Cir. 2017) (considering whether certain *Peterson* plaintiffs' could use U.S. courts to execute against assets allegedly owned by Bank Markazi in Luxembourg).

[237] 22 U.S.C. § 8772(a)(1).

holds equitable title to, or the beneficial interest in, the assets ... and that no other person possesses a constitutionally protected interest in the assets ... under the Fifth Amendment to the Constitution of the United States."[238]

While the Iran Threat Reduction Act is a freestanding measure separate and apart from TRIA,[239] it remains equally if not more explicitly connected to the U.S. government's sanctions authority for several reasons. First, as with TRIA, the Iran Threat Reduction Act defines "blocked assets" as any asset "seized or frozen by the United States" pursuant to TWEA or IEEPA.[240] Second, also like TRIA, the Iran Threat Reduction Act is an exception to the rule that judgment creditors must have an OFAC license in order to attach a blocked asset.[241]

Third, the Iran Threat Reduction Act was passed alongside a host of other laws aimed at "strengthen[ing] Iran sanctions laws for the purpose of compelling Iran to abandon its pursuit of nuclear weapons and other threatening activities. . . ."[242] Indeed, Congress described this part of the Iran Threat Reduction Act as "[furthering] the broader goals of . . . sanction[ing] Iran . . . ."[243]

Finally and perhaps most tellingly, the Iran Threat Reduction Act piggybacks off Executive Order 13,599 ("EO 13,599"), which was issued by the Obama Administration in February 2012 several months before the Iran Threat Reduction Act became law.[244] EO 13,599 invokes IEEPA to block ""[a]ll property and interests in property of the Government of Iran [or Iranian financial institutions], including the Central Bank of Iran, that are in the United States, that hereafter come within the United States, or that are or hereafter come within the possession or control of any United States person, including any foreign branch."[245] As the Supreme Court itself has noted, the Iran Threat Reduction Act was passed to clarify that the *Peterson* plaintiffs could attach certain assets—namely those allegedly belonging to Bank Markazi—sanctioned by EO 13,599, making that sanctions regime a vital part of the Iran Threat Reduction Act's judgment enforcement scheme.[246]

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[238] *Id.* at § 8772(a)(2). By only requiring "beneficial interest"—which is a right to the economic benefit of a property—rather than actual legal ownership, the Iran Threat Reduction Act arguably overcame any purported ownership hurdle to plaintiffs' execution efforts, especially since Bank Markazi had already conceded it had a beneficial interest in the assets. *Bank Markazi Motion to Dismiss Second Amended Complaint*, *supra* note 228, at 11.
[239] *Bank Markazi*, 578 U.S. at 218.
[240] 22 U.S.C. § 8772(d)(1)(a).
[241] OFAC, *Terrorist Assets Report Calendar Year 2019: Twenty-eighth Annual Report to the Congress on Assets in the United States Relating to Terrorist Countries and Organizations Engaged in International Terrorism* 3, U.S. DEP'T OF TREASURY, https://ofac.treasury.gov/media/50301/download?inline [https://perma.cc/A2F8-XE96].
[242] Iran Threat Reduction Act, *supra* note 57, at preamble.
[243] 22 U.S.C. § 8772(a)(2).
[244] Exec. Order No. 13,599, 77 FR 6659 (Feb. 5, 2012).
[245] *Id.*
[246] *See Bank Markazi*, 578 U.S. at 218 ("To place beyond dispute the availability of some of the Executive Order No. 13599-blocked assets for satisfaction of judgments rendered in terrorism cases, Congress passed . . . § 502 of the Iran Threat Reduction and Syria Human Rights Act of

As this part has shown, TRIA and the Iran Threat Reduction Act allow plaintiffs with terrorism-related final judgements to harness U.S. sanctions authorized under IEEPA or TWEA to fulfill their personal monetary goals. Indeed, plaintiffs' monetary ambitions depend heavily on the existence of those U.S. sanctions regimes. By leveraging the scope and reach of U.S. sanctions, plaintiffs in TRIA and Iran Threat Reduction Act cases are afforded the chance to fulfill their outstanding money judgments, where they would otherwise likely be left without a remedy.

Judgment enforcement actions under TRIA and the Iran Threat Reduction Act have other consequences as well, as the rest of this Article demonstrates. In particular, these statutes give plaintiffs the ability to shape and, at times, even expand the reach of U.S. sanctions, as well as to reinforce some of the most negative aspects of sanctions regimes.

III. INFLUENCING THE REACH OF U.S. SANCTIONS

Through their private judgment enforcement efforts, private plaintiffs in terrorism-related cases have the opportunity—whether they are cognizant or not—to influence the reach of U.S. sanctions in various ways. First, through suits under TRIA,[247] private plaintiffs can impact how courts interpret and understand government sanctions programs.[248] Second, plaintiffs bringing private judgment enforcement suits—whether under TRIA or the Iran Threat Reduction Act—expand upon the government's existing regime for permanently confiscating assets belonging to sanctioned states, entities, and individuals. Finally, private judgment enforcement actions—particularly under TRIA—can prompt the U.S. government to freeze assets pursuant to new sanctions programs or to open sanctions investigations.[249]

This section explores each of these issues in turn. It sets the stage for Part IV, which examines the ways in which private judgment enforcement suits under TRIA and the Iran Threat Reduction Act reinforce and add to some of the most troubling consequences of U.S. sanctions.

2012 . . . ."). *See infra* notes 400–02 and accompanying text for further discussion of the relationship between EO 13,599 and the Iran Threat Reduction Act.

[247] Because the Iran Threat Reduction Act specifically identifies the blocked assets that are subject to execution, it creates few opportunities for plaintiffs to meaningfully influence judicial interpretations of sanctions regimes. For that reason, it is not discussed here.

[248] While defendants can also shape sanctions regimes through TRIA litigation, their influence is beyond the scope of this Article, which focuses on the ways in which private plaintiffs bringing judgment enforcement actions under TRIA and the Iran Threat Reduction Act utilize, shape, and even expand U.S. sanctions.

[249] Again, because the Iran Threat Reduction Act is limited to a specific set of already-blocked assets and sanctioned entity, it provides plaintiffs with less of an opportunity to prompt the U.S. government to institute new sets of sanctions or open sanctions investigations.

A. Influencing Judicial Interpretation of Sanctions

Judgment enforcement efforts under the Terrorism Risk Insurance Act give litigants—especially private plaintiffs—a chance to influence judicial interpretations of U.S. sanctions. This is because plaintiffs must demonstrate, at minimum, that TRIA's operative elements are satisfied, in order to succeed on their claims.[250] Amongst other things, plaintiffs must prove that the assets in question are "blocked assets" that are "owned" by a terrorist party or its "agencies or instrumentalities."[251] By forcing courts to decide whether assets are "blocked assets," who "owns" them, and whether an entity is a terrorist party's "agency or instrumentality," private plaintiffs can shape the scope and reach of U.S. sanctions programs and policies.[252] Whether this litigation narrows, broadens, or simply maintains the scope of a sanctions regime, it affords private plaintiffs the opportunity to influence how sanctions rules and policies will be understood and enforced by the courts—a not insignificant power that could possibly impact the United States' sanctions-related activities.

These potential effects have not been lost on the executive branch, which has stated that "any judicial application of TRIA has important consequences for the executive['s]. . . implementation of sanctions regimes in the public interest."[253] Indeed, even though the United States' support and approval is not required for TRIA plaintiffs to pursue their claims,[254] the executive often involves itself in TRIA litigation, including as amicus curiae.[255] And while the courts may frequently reach conclusions that align with the government's own positions,[256] they have also made

[250] *See, e.g.*, Levinson v. Kuwait Finance House (Malaysia) Berhad, 44 F.4th 91, 97 (2d Cir. 2022) ("[B]efore ordering assets to be seized under TRIA, a district court must make findings as to whether TRIA indeed permits those assets to be seized.").

[251] *See* Ministry of Defense and Support for the Armed Forces of the Islamic Rep. of Iran v. Elahi, 556 U.S. 366, 374–75 (2009) (examining whether an asset is "blocked" to determine whether TRIA applies) [hereinafter *Elahi II*]; Estate of Levin v. Wells Fargo Bank, N.A., 45 F.4th 416, 419–24 (D.C. Cir. 2022) (TRIA suit exploring whether a blocked asset is "owned" by a terrorist party, its agencies, or instrumentalities); Stansell v. Revolutionary Armed Forces of Colombia, 45 F.4th 1340, 1349 (11th Cir. 2022) (examining whether the owners of assets targeted by plaintiffs' TRIA action were "agencies or instrumentalities" of a terrorist party) [hereinafter *Stansell IV*].

[252] While there are other elements of TRIA that plaintiffs must satisfy to succeed on their claims, these are the most important issues when it comes to influencing judicial interpretations of the scope and reach of U.S. sanctions. *See* Weininger v. Castro, 462 F. Supp. 2d 457, 479 (S.D.N.Y. 2006) (listing additional TRIA elements that plaintiff must satisfy to succeed on their claims).

[253] *Heiser I*, 735 F.3d at 441.

[254] Harrison v. Republic of Sudan, 838 F.3d 86, 97 (2d Cir. 2016).

[255] *See*, *e.g.*, *Heiser II*, 735 F.3d at 937 (TRIA case in which the U.S. government participated as amicus curiae to opine on whether assets targeted by plaintiff had to be legally owned by a terrorist party). Sometimes the courts themselves have requested the U.S. government's views in pending TRIA litigation. Caballero v. Fuerzas Armadas Revolucionarias de Colombia, 2022 WL 633572, *2–3 (W.D.N.Y. Mar. 4, 2022).

[256] *See* Rubin v. Islamic Republic of Iran, 709 F.3d 49, 57 (1st Cir. 2013) (noting that "[t]he fact that blocked assets play an important role in the conduct of United States foreign policy may provide a . . . reason for deference to the views of the executive branch in this [TRIA] case");

clear their duty to construe TRIA's blocking regime—and the sanctions programs it implicates—on its own terms.[257] So while the executive's sanctions-related views may be entitled to deference,[258] they are not a per se substitute for the courts own independent consideration of the issues involved in TRIA suits.[259]

This section explores the three key issues raised by TRIA litigation to demonstrate how private plaintiffs can influence judicial interpretations of sanctions programs. It begins by examining the question of whether assets are "blocked" under TRIA, then turns to the question of "ownership," and ends with the "agency or instrumentality" issue.

The purpose of this section is not to insist that all or even most TRIA judgment enforcement actions necessarily shape judicial interpretations of U.S. sanctions or do so in ways that actually impact the executive's sanctions practices, particularly as expressed through OFAC.[260] Instead, this section highlights the opportunities TRIA litigation creates for private plaintiffs to influence judicial approaches to sanctions regimes and the ways those interpretations can potentially impact the conceptual scope of those regimes. As reflected in this section, at times this may mean the courts—at plaintiffs' urging—reach determinations about the reach of a sanctions program that the executive itself has not explicitly and publicly embraced.[261] In other circumstances, judicial interpretations—again, at plaintiffs' urging—may generate conflicts with the executive's sanctions practices.[262] In either case, TRIA litigation has the potential to turn private plaintiffs into de facto sanctions policymakers, at least as far as the courts are concerned.

1. Blocked Assets

To determine whether an asset is "blocked" under TRIA, courts must typically consider a number of issues. While TRIA defines a "blocked asset" as any asset "seized or frozen" pursuant to applicable provisions of either IEEPA or TWEA,[263] it does not define what it means for an asset to be "seized" or "frozen."[264] Courts that have considered the issue have held that freezing or seizing an asset creates an "across-the-board prohibition against transfers or transactions of any

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Heiser I, 735 F.3d at 441 (noting the "important role blocked assets play in foreign policy" in deferring to the U.S. government's interpretation of the TRIA statute).

[257] Hausler v. JP Morgan Chase Bank, N.A., 740 F. Supp. 2d 525, 537–38 (S.D.N.Y. 2010) [hereinafter *Hausler I*].

[258] In re 650 Fifth Ave., 2013 WL 2451067, *6 (S.D.N.Y. June 6, 2013).

[259] *See, e.g., id.* at *5 n.8 (noting that OFAC's Specially Designated Nationals list is not dispositive as to whether an entity or its assets can be subject to a TRIA suit).

[260] While acknowledging that this may not necessarily always be the case, this section treats OFAC and the executive branch as one and the same when it comes to sanctions policies and practices.

[261] *See, e.g., infra* notes 271–80 and accompanying text.

[262] *See, e.g., infra* notes 281–88 and accompanying text.

[263] Weinstein v. Islamic Republic of Iran, 299 F. Supp. 2d 63, 74 (E.D.N.Y. 2004).

[264] *Id.* Neither IEEPA nor TWEA defines what constitutes a "seized" or "frozen" asset.

kind with regard to the property" and gives a "possessory interest" in the property to the U.S. government.[265] As part of this inquiry, courts must also determine whether the asset in question is blocked at the time the court decides the TRIA suit.[266]

In addressing these questions, courts usually must weigh in on whether the targeted asset is covered by a specific IEEPA or TWEA-authorized sanctions program during the relevant period.[267] This inquiry can include determining whether an individual or entity—as well as its property—is subject to sanctions or just whether the asset itself is blocked.[268] In either case, courts must effectively decide what a sanctions program does or does not cover. This gives private plaintiffs the opportunity to shape how a sanctions regime is judicially construed, separate and apart from OFAC's position on the issue. In some cases, it may not be clear whether the court's ultimate conclusion aligns with OFAC's view, as the office may not have taken a public position on the issue. At other times, judicial interpretations of a sanctions regime's scope may more clearly conflict with OFAC's own position.

Plaintiffs' interpretative impact may be particularly significant where courts must determine if the person or entity *itself*—and, therefore, also its assets—is subject to sanctions. Pursuant to OFAC regulations, an entity or person can be subject to sanctions even if they are not formally designated as such by OFAC.[269] In some TRIA suits, courts have weighed in on whether an individual or entity is one of these unlisted, but nevertheless sanctioned persons—a meaningful and even game-changing determination for the targets of these inquiries.[270]

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[265] Weinstein, 299 F. Supp. 2d at 75. As courts have held, "not every [government] action regarding property under the authority of the IEEPA [or TWEA], including assets that may be 'regulated' or 'licensed,' results in the property being 'blocked' under the TRIA." *Id.* That being said, TRIA's approach to "blocked" assets arguably aligns with OFAC's own definition of blocked property. *See supra* note 44.

[266] *Elahi II*, *supra* note 251, at 377. At least one court has suggested that the asset must be blocked both at the time plaintiff moves to attach the asset, as well as when the court decides the issue. *See Stansell IV*, 45 F.4th at 1349–50 ("A [defendant's] assets must be blocked under the TRIA when the motion for a writ of garnishment is filed, and when the writ is issued.").

[267] *See Elahi II*, *supra* note 251, at 377–79 (evaluating relevant sanctions regimes to determine whether the property in question was "blocked" under IEEPA).

[268] *See infra* notes 271–88 and accompanying text. As discussed below, plaintiffs will typically focus on whether an asset—as opposed to its owner—is subject to sanctions when the owner is clearly sanctioned but the asset in question may not be. *Id.*

[269] Most notably, where a blocked person or entity directly or indirectly owns 50% or more of another entity, that entity and its assets are automatically blocked under sanctions law even if the entity's name does not appear on the SDN list. OFAC, *Revised Guidance on Entities Owned by Persons Whose Property and Interests in Property Are Blocked*, U.S. DEP'T OF TREASURY, Aug. 13, 2014, https://home.treasury.gov/system/files/126/licensing_guidance.pdf [https://perma.cc/LU5Q-M8F3].

[270] Having a U.S. court officially recognize an individual or entities' sanctioned status, when they have not already been designated as such by the U.S. government, arguably increases the likelihood that other persons and organizations—for example, private financial institutions—will recognize and treat them as sanctioned.

On this issue *Kirschenbaum v. 650 Fifth Avenue and Related Properties* is instructive. *Kirschenbaum* involved TRIA claims to enforce outstanding default judgments against Iran entered under Section 1605A of the FSIA and its predecessor statute.[271] Plaintiffs used TRIA to try and enforce these unsatisfied judgments against third-party defendants who owned various properties located in the United States.[272] In construing plaintiffs' suit, the Second Circuit had to determine whether two of the defendants that were not designated as sanctioned entities by OFAC—a non-profit foundation and corporate partnership both of whom were domiciled in New York—were nevertheless subject to U.S. sanctions and the properties they owned thereby blocked.[273]

In grappling with these TRIA-related issues, the Second Circuit construed the scope of EO 13,599—the 2012 executive order creating various sanctions relating to the Iranian government and Iranian financial institutions.[274] The court concluded that, as long as defendants satisfied the definition of the "Government of Iran" under EO 13,599, they were sanctioned by the executive order and their assets were blocked, even if they were not formally designated by the executive branch.[275] The Second Circuit ultimately remanded to the district court to determine whether defendants satisfied the definition of the Government of Iran.[276] The district court concluded that they did and that their assets were blocked under EO 13,599.[277] The district court's decision was eventually reversed and remanded by the Second Circuit, on other grounds.[278] Ultimately, the matter did not proceed further.

Based on a search of the relevant dockets, the executive branch does not seem to have weighed in or otherwise provided its views to the *Kirschenbaum* court as to whether defendants were sanctioned entities whose properties were blocked under EO 13,599. While the appellate and district court interpretations of EO

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[271] Kirschenbaum v. 650 Fifth Ave. and Related Property, 830 F.3d 107 (2d Cir. 2016), *abrogated in part by* Rubin v. Islamic Rep. of Iran, 138 S.Ct. 816 (2018) [hereinafter *Kirschenbaum I*].
[272] *Id.* at 118.
[273] *Id.* at 118, 120–21, 137 n.21. The defendants in question were the Alavi Foundation and 650 Fifth Avenue Company. While plaintiffs also sued other defendants, they were not part of this appeal.
[274] *Id.* at 137–41.
[275] *Id.* at 137–40. In reaching this conclusion, the court highlighted language in an OFAC regulation implementing EO 13,599, which stated that "[t]he property and interests in property of persons who meet the definitions of the terms Government of Iran or Iranian financial institution [under EO 13,599] are blocked pursuant to this section regardless of whether the names of such persons are published in the Federal Register or incorporated into the SDN List." *Id.* at 138.
[276] *Id.* at 141.
[277] Kirschenbaum v. 650 Fifth Avenue, 257 F. Supp. 3d 463, 516 (S.D.N.Y. 2017), *rev'd and remanded on other grounds*, Havlish v. 650 Fifth Avenue Company, 934 F.3d 174 (2nd Cir. 2019) [hereinafter *Kirschenbaum II*].
[278] Havlish v. 650 Fifth Avenue Company, 934 F.3d 174 (2nd Cir. 2019).

13,599 may, nevertheless, be consistent with OFAC policy,[279] the *Kirschenbaum* litigation gave private plaintiffs the opportunity to influence judicial views as to whether defendants and their assets were covered by a particular sanctions regime in circumstances where the executive had not explicitly and publicly expressed a view on the matter.[280]

TRIA plaintiffs can also influence judicial interpretations of a sanction's scope by advocating for certain assets—as opposed to individuals or entities—to be treated as blocked by U.S. sanctions. Even where a state, other entity, or individual is sanctioned under IEEPA or TWEA, those sanctions may not apply to all its assets. In those circumstances, private plaintiffs may push for interpretations of sanctions regimes that reach assets the executive itself may not believe are covered by those regimes. Plaintiffs' views may even prevail—at least, for a time.

This dynamic was on display in a series of decisions in *Ministry of Defense and Support for the Armed Forces of the Islamic Republic of Iran v. Elahi*. In *Elahi*, the Ninth Circuit Court of Appeals considered whether an asset belonging to Iran—which plaintiff sought to attach in fulfillment of an outstanding judgment secured under the FSIA terrorism exception against Iran—was a "blocked asset" under TRIA.[281] While Iran was subject to far fewer U.S. sanctions when *Elahi* was considered than it is now, it was still subject to some sanctions. It was unclear, however, whether the asset in question was subject to that more limited sanctions framework.[282]

In determining whether the asset was, in fact, covered, the Ninth Circuit construed the scope of executive orders and regulations relating to sanctions against Iran instituted shortly after the commencement of the Iranian hostage crisis in November 1979.[283] While the Ninth Circuit noted that "[f]ollowing release of the

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[279] In a separate but related proceeding, another district court in the Second Circuit concluded that defendants were not, in fact, subject to EO 13,599. Levin v. 650 Fifth Avenue Co, 2022 WL 3701156, *5 (S.D.N.Y. Aug. 26, 2022). That ruling remains undisturbed.

[280] Indeed, in a parallel civil forfeiture action against defendants' properties, the executive branch did not claim defendants were sanctioned entities or that their assets were blocked. Instead, that forfeiture action was based on defendants purported financial transactions with sanctioned entities in violation of U.S. sanctions regulations. Amended Complaint, In re: 650 Fifth Avenue and Related Properties, No. 1:08-cv-10934, ¶¶ 2, 5 (Nov. 12, 2009). Although that proceeding began before EO 13,599 was issued, as of this writing, the Alavi Foundation and the 650 Fifth Avenue Company still do not appear on the SDN list. OFAC, Sanctions List Search, https://sanctionssearch.ofac.treas.gov [https://perma.cc/2FR3-M42L]. [last visited September 12, 2023].

[281] Ministry of Defense and Support for Armed Forces of Islamic Republic of Iran v. Cubic Defense Systems, Incl, 495 F.3d 1024 (9th Cir. 2007), *rev'd*, 556 U.S. 366 [hereinafter *Elahi I*].

[282] *Id.* at 1032–33.

[283] *Id.* at 1033. The Iranian hostage crisis was triggered when a group of students stormed the U.S. embassy in Tehran, Iran and took numerous Americans hostage. *The Iranian Hostage Crisis*, U.S. State Dep't, https://history.state.gov/departmenthistory/short-history/iraniancrises (last visited Aug. 13, 2023) [https://perma.cc/N7G7-39ZL]. The history of U.S. sanctions against Iran begins with this hostage crisis. Kate Hewitt and Richard Nephew, *How the Iran Hostage Crisis Shaped*

hostages [in January 1981], the United States unblocked most Iranian assets," it ultimately concluded that the asset in question—namely, a judgment enforcing an arbitral award in favor of Iran that was confirmed nearly two decades after the hostage crisis in 1998[284]—was still subject to that largely defunct sanctions regime.[285]

The Supreme Court disagreed. Reversing the Ninth Circuit's decision, the Court held that the asset was not covered by a sanctions regime at the time the appellate court reached its decision.[286] In particular, it noted that the judgment enforcing the arbitral award arose "more than 17 years" after the United States had ended the applicable sanctions regime against Iran.[287] In reaching this conclusion and overturning the Ninth Circuit, the Supreme Court's position appears to have aligned with the executive branch's own views on the matter.[288] Nevertheless, the Ninth Circuit's decision in *Elahi* created a moment of conflict between judicial views on the scope of a sanctions program and the executive's view. It also provided private litigants with an opportunity—however temporary—to extend a sanctions regime to assets the executive itself did not seem to believe were covered by particular sanctions programs.

2. Ownership

As with the issue of "blocked assets," TRIA plaintiffs can impact judicial interpretations of the scope and reach of U.S. sanctions through the issue of asset ownership. Under TRIA, plaintiffs much demonstrate that the blocked assets they seek to attach are "of" a terrorist party, its agencies, or instrumentalities.[289] Since TRIA does not define the kind of property interests that may be subject to execution, there have been judicial debates over whether TRIA requires that the blocked asset be *legally owned* by a terrorist party, its agencies, or instrumentalities.[290] Some circuits, like the D.C. Circuit, have said that legal ownership is required.[291] Other circuits, like the Second Circuit, have adopted a

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the U.S. Approach to Sanctions, Brookings (Mar 12, 2019), https://www.brookings.edu/articles/how-the-iran-hostage-crisis-shaped-the-us-approach-to-sanctions/ [https://perma.cc/ZWW6-KK2F].

[284] *Elahi II*, *supra* note 251, at 376.

[285] *Elahi I*, *supra* note 281, at 1033–34. In reaching this decision, the Ninth Circuit reasoned that the arbitral award remained subject to a U.S. sanctions order from November 1979 that continued to block military goods owned by Iran. *Id.*

[286] *Elahi II*, supra note 251, at 376. While it suggested the asset in question might be covered by a new sanctions regime in effect at the time of its decision, the Court ultimately did not reach the issue. *Id.* at 378–79.

[287] *Id*.

[288] *Id.* at 377. That being said, the executive branch did take the position that the targeted asset was blocked by a new sanctions regime in effect at the time the Supreme Court was considering plaintiff's TRIA claim. *Id.* at 378.

[289] 28 U.S.C. § 1610; TRIA, *supra* note 9, at § 201(a).

[290] *See Rubin*, 709 F.3d at 54 ("There exists some debate as to whether TRIA [requires]. . . that the terrorist party must actually [legally] *own* the assets.").

[291] *E.g. Heiser II*, 735 F.3d at 938–39.

more ambiguous position. While some lower courts in the Second Circuit have held that legal ownership is necessary, others have suggested that a more generous standard may apply.[292] On the whole, however, most courts appear to favor a legal ownership requirement under TRIA.[293]

No matter which position a court takes, TRIA plaintiffs must show that the terrorist party, its agencies, or instrumentalities, have a property interest of some kind in the asset. For courts that do not require legal ownership, that property interest is satisfied as long as the asset is blocked pursuant to an applicable sanctions regime against the terrorist party, its agencies, or instrumentalities.[294] In those cases, courts focus simply on whether the asset in question is a "blocked asset"[295]—which, as discussed above, creates its own opportunities for plaintiffs to influence judicial interpretations of sanctions.[296]

For those courts demanding a legal ownership requirement, some have looked to applicable state law to determine the ownership issue,[297] while others have fashioned federal common law rules to decide whether a party "owns" a blocked asset under TRIA.[298] Either way, judicial consideration of the legal ownership issue can impact the scope of a U.S. sanctions regime.

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[292] *See* Hausler v. J.P. Morgan Chase Bank, 845 F. Supp. 2d 553, 562–67 (S.D.N.Y. 2012), *rev'd and remanded on other grounds by* Hausler v. JP Morgan Chase Bank, N.A., 770 F.3d 207, 211 (2d Cir. 2014) [hereinafter *Hausler II*] (TRIA case describing split within Second Circuit district courts as to whether a terrorist party, its agencies, or instrumentalities must legally own the asset under state law for it to be subject to TRIA). Recent case law suggests that the Second Circuit Court of Appeals may be moving towards a legal ownership requirement. *See* Doe, 899 F.3d at 156–57 (considering whether blocked electronic funds transfers ("EFTs") could be attached under TRIA by examining whether the agencies or instrumentalities of a judgment debtor had legal ownership over those EFTs under New York state law). The Second Circuit Court of Appeals has, however, yet to explicitly stake out a position on the issue.

[293] *See, e.g.*, Bennett v. Islamic Republic of Iran, 825 F.3d 949, 963 (9th Cir. 2016), *overruled in part*, Rubin v. Islamic Republic of Iran, 138 S.Ct. 816 (2018) (suggesting TRIA requires the terrorist party, its agencies, or instrumentalities, legally own the asset in question); Stansell v. Revolutionary Armed Forces of Colombia, 771 F.3d 713, 726 (11th Cir. 2014) [hereinafter *Stansell III*] ("TRIA execution requires two separate determinations regarding the property being executed: (i) that the asset is blocked, and (ii) that the [legal] *owner* of the asset is an agency or instrumentality of the judgment debtor.") (emphasis added); Caballero v. Fuerzas Armadas Revolucionaries de Colombia, 2020 WL 11571726, at *2 (N.D. Cal. Oct. 8, 2020) (same); Gates v. Syrian Arab Republic, 2013 WL 1337223, at *8–9 (N.D. Ill. Mar. 29, 2013) (concluding that TRIA requires the terrorist party, its agencies, or instrumentalities have a legal "ownership" interest in the asset in question). Notably, the executive branch has taken the position that TRIA has a legal ownership requirement. Gates, 2013 WL 1337223 at *8.

[294] *Hausler II*, 845 F. Supp. 2d at 562–63, 566; Levin v. Bank of New York, 2011 WL 812032, at *16–17 (S.D.N.Y. Mar. 4, 2011).

[295] *E.g. Levin*, 2011 WL 812032 at *16–17.

[296] *See* Part III.A.1.

[297] *E.g. Doe*, 899 F.3d at 156; *Bennett*, 825 F.3d at 963.

[298] *E.g. Heiser II*, 735 F.3d at 940.

Sometimes this impact can have far-reaching implications for sanctions programs. *Levin v. Islamic Republic of Iran* arguably reflects this phenomenon.[299] In that case, the D.C. district court considered whether Iran—against whom plaintiffs had an outstanding judgment—legally owned certain blocked assets.[300] While the district court determined that Iran did not legally own the assets,[301] the D.C. Circuit disagreed.[302] In the process, the circuit court reached a conclusion about the general scope of U.S. sanctions programs that potentially upends how OFAC itself understands its regulations. Specifically, the appellate court concluded that "[if] a terrorist's [ownership] interest in funds is. . . [nonexistent] there would be no authorization [for OFAC] to block those . . . funds as 'property or interests in property'" of a designated terrorist party.[303] As mentioned earlier, OFAC's blocking orders apply not only to assets that are legally owned by sanctioned parties but also to assets in which such entities have "any interest whatsoever."[304] In *Levin*—which was specifically concerned with whether Iran had legal ownership over particular assets—the D.C. Circuit's opinion could be read to suggest that a sanctioned entity *must* legally own an asset in order for sanctions to apply.[305] While the court's position on this issue was somewhat ambiguous, it raises the possibility of conflict with OFAC's more flexible approach to its blocking orders—whether or not the court intended or was aware of this consequence.

3. Agency or Instrumentality

Finally, private plaintiffs can impact judicial interpretations of the scope of U.S. sanctions by advocating for certain entities or individuals to be considered agencies or instrumentalities of terrorist parties. This may, in turn, subject those persons to sanctions regimes that the executive branch has not publicly applied to them.

Under TRIA, the assets of a terrorist party's agencies or instrumentalities can be attached, even if the agency or instrumentality is not named in the underlying judgment.[306] TRIA does not, however, define what the terms "agency or

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[299] Levin v. Islamic Rep. of Iran, N.A., 523 F. Supp. 3d 14 (D.D.C. 2021), *rev'd and remanded*, Estate of Levin v. Wells Fargo Bank, N.A., 45 F.4th 416 (D.C. Cir. 2022).
[300] *Id.* at 20–24.
[301] *Id.* at 24.
[302] *Estate of Levin*, 45 F.4th at 416.
[303] *Id.* at 423.
[304] *See OFAC 16th Asset Report, supra* note 211 and accompanying text.
[305] The D.C. Circuit was not the first to make this observation about OFAC's blocking authority. In fact, in reaching this conclusion, the appellate court referenced a dissent from a case in the Second Circuit. In that case—*Doe v. JP Morgan Chase Bank*—the dissenting judge concluded that if a terrorist entity has no meaningful property interest in an asset, then OFAC would have "no authorization to block those [assets] as 'property or interests in property' of a designated terrorist party because that property [would not belong] . . . to the designated terrorist party." *Doe*, 899 F.3d at 161 (Chin, J, dissenting). While it is less clear if an ownership interest was at issue in *Doe*, the dissent did suggest that not just any property interest in an asset would trigger OFAC sanctions.
[306] *Kirschenbaum I*, 830 F.3d at 132.

instrumentality" mean.[307] While the Foreign Sovereign Immunities Act defines an agency or instrumentality under that statute, courts have declined to apply the FSIA definition to TRIA,[308] and have, instead, defined those terms according to their "ordinary meaning."[309]

To establish that an entity or individual is an agency or instrumentality of a terrorist party under TRIA, courts have required plaintiffs to show that the entity or individual "(1) was a means through which a material function of the terrorist party is accomplished, (2) provided material services to, on behalf of, or in support of the terrorist party, or (3) was owned, controlled, or directed by the terrorist party."[310] According to some courts, "an indirect relationship can suffice" to meet TRIA's agency or instrumentality standard—though the "the more attenuated the link the more difficult it will be to prove" that a defendant qualifies as an agency or instrumentality.[311]

In their effort to establish defendants' agency/instrumentality status, plaintiffs have sometimes prompted courts to consider whether the relationship between a defendant and a terrorist party may subject the former to sanctions. This has been particularly evident in cases where the terms and requirements of the relevant sanctions program overlap with TRIA's agency/instrumentality analysis, as reflected in the aforementioned *Kirschenbaum* case.[312]

To recall, in *Kirschenbaum*, plaintiffs brought a TRIA claim against two defendants that had not been named as sanctioned entities by the executive branch but whose assets plaintiffs claimed were nevertheless blocked pursuant to EO 13,599's sanctions program.[313] As part of their TRIA claim, plaintiffs *also* argued that defendants were agencies or instrumentalities of a terrorist party—in that case,

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[307] *Stansell III*, 771 F.3d at 723.
[308] *E.g.*, *Kirschenbaum I*, 830 F.3d at 132–33; *Stansell III*, 771 F.3d at 731.
[309] *Kirschenbaum I*, 830 F.3d at 135; *Stansell III*, 771 F.3d at 732.
[310] *Kirschenbaum I*, 830 F.3d at 135. This standard has been adopted, with slight variation, by other circuits that have weighed in on the agency and instrumentality issue. *See, e.g., Stansell IV*, 45 F.4th at 1357 (defining an agency or instrumentality under TRIA as "(1) materially assisting in, or providing financial or technological support for or to, or providing goods or services in support of . . . [the terrorist party's activities]; (2) [being] owned, controlled, or directed by, or acting for or on behalf of . . . [the terrorist party]; and/or (3) playing a significant role in . . . [the terrorist party's activities]."). While this test may suggest agencies and instrumentalities are one in the same, courts construing TRIA claims have treated agencies and instrumentalities as distinct entities. *Kirschenbaum II*, 257 F. Supp. 3d at 517–18.
[311] *Stansell IV*, 45 F.4th at 1357.
[312] The agency/instrumentality issue can also shape a sanction regime's scope as a result of the 50% rule. As mentioned earlier, where a blocked person or entity directly or indirectly owns 50% or more of another entity, that entity and its assets are automatically blocked even if it does not appear on the SDN list. *See supra* note 269. Where a court concludes that a TRIA defendant is an agency or instrumentality of a terrorist party because it is owned, controlled, or directed by the terrorist party, that determination could trigger the 50% rule.
[313] *See supra* notes 271–74 and accompanying text.

Iran.[314] Even though this part of the plaintiffs' argument did not hinge on the scope of any sanctions regime, the district court in *Kirschenbaum* observed that if defendants were Iran's agencies or instrumentalities under TRIA, they would also necessarily be covered by the terms of EO 13,599, which overlapped with the agency/instrumentality analysis.[315]

Ultimately, the district court concluded that defendants did, in fact, constitute agencies or instrumentalities of Iran under TRIA.[316] While, as noted above, the same court separately concluded that defendants were directly subject to EO 13,599,[317] the court's agency/instrumentality analysis represented an alternative basis for subjecting defendants to that sanctions regime—again, without the executive branch's input or involvement.[318]

The ability to influence judicial interpretations of "blocked assets," "ownership," and "agency or instrumentality" status under TRIA gives private plaintiffs meaningful powers vis a vis U.S. sanctions. It affords them the opportunity both to influence how the courts interpret an underlying sanctions regime and to act as de facto sanctions policy makers. Whether they intend to or not, private plaintiffs may be able to prompt judicial determinations about the scope or reach of a sanctions program that the executive branch itself has not publicly opined on or supported. In other situations, private plaintiffs may cause courts to adopt positions that conflict with OFAC's practices. Whether or not these decisions actually impact U.S. sanctions programs, they affect the interests of the U.S. government—something underscored by the United States' frequent participation in TRIA litigation.

TRIA also gives private plaintiffs another important avenue for affecting the scope and reach of U.S. sanctions—namely, the ability to permanently confiscate the blocked assets of sanctioned countries, other entities, and individuals, as explored in the next section.

B. Expanding Permanent Confiscations

In addition to potentially shaping judicial interpretations of sanctions programs, private judgment enforcement suits under the Terrorism Risk Insurance Act, as well as the Iran Threat Reduction Act, arguably expand upon the largely disfavored practice of permanently confiscating the blocked assets of sanctioned states, other entities, and individuals. Permanent confiscation means the permanent

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[314] *Kirschenbaum II*, 257 F. Supp. 3d at 516.

[315] *See id.* (noting that "the same facts that determine whether an entity satisfied the definition of . . . an 'agency or instrumentality' of a terrorist party under TRIA . . . also answer the question as to whether the entity satisfies Executive Order 13,599's [elements]").

[316] *Id.* at 518–25.

[317] *See supra* notes 276–77 and accompanying text.

[318] As mentioned earlier, the Second Circuit vacated this opinion in *Kirschenbaum* on other grounds. *See supra* note 278 and accompanying text.

transfer of ownership or beneficial property interest in an asset from the original owner or interest holder to another person or entity.[319] As this section demonstrates, the permanent confiscation of sanctioned assets—especially private property—has long been controversial in the United States, especially during peacetime but even during war.

Outside TRIA and the Iran Threat Reduction Act suits, permanent confiscation is allowed in limited circumstances and, then, almost exclusively by the U.S. government.[320] By allowing private parties to permanently confiscate the blocked assets of sanctioned states, other entities, and individuals, TRIA and the Iran Threat Reduction expand this permanent confiscation regime, arguably remove policy constraints on those confiscations, and transform the consequences and impact of U.S. sanctions for effected parties.

To demonstrate the limited and largely disfavored nature of permanent confiscations, as well as how TRIA and the Iran Threat Reduction Act loosen constraints on and expand the practice of permanently confiscating sanctioned assets, this section explores the primary means by which the U.S. government confiscates sanctioned assets and how those practices have evolved historically. It begins by examining the U.S. government's permanent confiscation practices prior to 1977 under the Trading with the Enemy Act. It then explores the government's current confiscation practices under the International Emergency Economic Powers Act, the amended TWEA, and federal civil and criminal forfeiture laws.

1. Permanent Confiscations under Old TWEA

Under the TWEA-dominated sanctions framework that existed before 1977, the permanent confiscation of sanctioned assets was allowed first during wartime and eventually also during peacetime emergencies.[321] That being said, the government's practice of permanently seizing assets, even during war, was controversial and often criticized, especially when it came to private property.

As originally promulgated during World War I, TWEA allowed the president to seize property belonging to an enemy or an ally of an enemy.[322] These powers extended not only to property held by the German and Austrio-Hungarian states—who were the United States' "enemies" during the war—but also to

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[319] Ingrid (Wuerth) Brunk, *Countermeasures and the Confiscation of Russian Central Bank Assets*, LAWFARE (May 3, 2023), https://www.lawfaremedia.org/article/countermeasures-and-the-confiscation-of-russian-central-bank-assets [https://perma.cc/AL7B-7TBR].

[320] As mentioned earlier, while there is another statutory provision—specifically under the FSIA—that allows private parties to permanently confiscate the blocked assets of state sponsors of terrorism, that provision is largely defunct. *See supra* notes 194–95 and accompanying text.

[321] Andrew Boyle, *Why Proposals for U.S. to Liquidate and Use Russian Central Bank Assets Are Legally Unavailable*, JUST SECURITY (Apr. 18, 2022), https://www.justsecurity.org/81165/why-proposals-for-u-s-to-liquidate-and-use-russian-central-bank-assets-are-legally-unavailable/ [https://perma.cc/2BRF-B5Q7].

[322] TWEA, *supra* note 52, at § 5(b).

privately-held property.[323] While TWEA originally allowed the president to transfer these seized properties to the U.S. government and direct the property be sold if necessary to "protect such property" and "prevent waste,"[324] it did not generally authorize the permanent confiscation of seized assets.[325] Indeed, U.S. officials initially disavowed any desire to permanently confiscate properties seized under TWEA during World War I. Since permanent confiscation would "undermine Americans' vision of their role in the world," asset seizure under TWEA was supposed to be *temporary*, with American officials promising to return such property after the war was over.[326]

In contrast to these representations, over the course of World War I, Congress expanded TWEA several times to authorize the permanent confiscation of seized assets—sparking critique and controversy over the practice. In March 1918, Congress amended TWEA to give the president the power to sell seized enemy property through public sales.[327] On November 1918, Congress amended TWEA again, this time giving the president the authority to sell seized enemy patents and trademarks.[328] While these powers were arguably limited to the war's duration, the sale of seized enemy property continued after the end of World War I. Indeed, the Wilson administration authorized such sales on several occasions following the war's conclusion.[329] These and other permanent confiscations under TWEA—and, indeed, whether such confiscations were actually authorized by amendments to the statute—were disputed and debated, especially when it came to private property.[330] Efforts were eventually undertaken by Congress to reverse many of these confiscations.[331]

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[323] *Id.* at § 2.
[324] *Id.* at §§ 7(c), 12.
[325] Because TWEA originally only allowed seized property to be sold to "prevent waste" and "protect such property," it was understood to make the government a conservator and not to authorize permanent confiscations. U.S. v. Chemical Foundation, 272 U.S. 1, 10 (1926).
[326] Coates*, supra* note 53*,* at 158.
[327] *The Sale of German Owned Patents Under the Trading with the Enemy Act as Amended*, 33 YALE L. J. 760, 760–61 (1924); Making Appropriations to Supply Urgent deficiencies in Appropriations for the Fiscal Year Ending June Thirtieth, Nineteen Hundred and Eighteen, and Prior Fiscal Years, on Account of War Expenses, and for Other Purposes, Public Law 65-109/Chapter 28, 65 Congress. 40 Stat. 459 (1918) [hereinafter *1918 Congressional Fiscal Appropriations*].
[328] *The Sale of German Owned Patents Under the Trading with the Enemy Act as Amended*, *supra* note 327, at 761; *1918 Congressional Fiscal Appropriations*, *supra* note 327.
[329] Edwin Borchard, *Enemy Private Property*, 18 AM. J. OF INT'L L. 523, 530 (1924); *The Sale of German Owned Patents Under the Trading with the Enemy Act as Amended*, *supra* note 327, at 760–61.
[330] *See* Borchard, *supra* note 329, at 529 (arguing that TWEA, even as amended at the end of World War I, was not intended to generally authorize the permanent confiscation of seized enemy assets); *The Sale of German Owned Patents Under the Trading with the Enemy Act as Amended*, *supra* note 327, at 762–65 (same); Edwin Borchard, *The Settlement of War Claims Act of 1928*, 22 AM. J. OF INT'L L 373, 379 (1928) (arguing in the aftermath of World War I confiscations that "the United States . . . should not again sequestrate enemy private property").
[331] Under congressional legislation formally ending World War I, the U.S. retained all property it had seized during the war from the German and Austro-Hungarian governments and their

Despite this reversal of World War I-era seizures, the president's powers of permanent confiscation under TWEA solidified and expanded even further after the war. In 1926, the Supreme Court confirmed that TWEA, as amended, permitted the president to permanently confiscate assets seized during World War I.[332] Then, in 1941, with World War II in the backdrop, Congress amended TWEA again, to further broaden the president's permanent confiscation authority.[333] Under this amendment, the president was authorized to "'vest seized foreign property—meaning that such property could be licensed, liquidated, or sold" both during times of war, as well as during peacetime national emergencies.[334] The provision applied not just to those who qualified as "enemies" under TWEA[335] but also to all foreign countries and foreign nationals.[336] Thanks to this expanded authority, as of 1948, the U.S. government had seized and vested property totaling approximately $600 million.[337]

As with permanent confiscations during World War I, the permanent confiscation of seized assets during World War II was controversial, especially when it came to private property.[338] While the United States ultimately did not return most properties seized from German and Japanese nationals during World

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nationals. Joint Resolution Terminating the State of War Between the Imperial German Government and the United States of America and Between the Imperial and Royal Austro-Hungarian Government and the United States of America, Public Law 67-32, Chap. 40, 67 Congress. 42 Stat. 105 (1921). At the end of the 1920s, however, Congress passed legislation providing for the return of most of those properties confiscated from German, Austrian, and Hungarian nationals during World War I. 1928 Settlement of War Claims Act, ch. 167, 45 Stat. 254, § 11 (Mar. 10, 1928); William Reeves, *Is Confiscation of Enemy Assets in the National Interest of the United States?*, 40 U. VA. L. REV. 1029, 1037 (1954).

[332] *Chemical Foundation*, 272 U.S. at 9–11.

[333] First War Powers Act, 1941, P. L. 77-354, 55 Stat. 839, ch. 593, § 301 (1941).

[334] Coates*, supra* note 53, at 163.

[335] Prior to the 1941 amendment, TWEA's confiscation powers were limited to those properties owned by "enemies," as defined by the statute. Emergency Controls on International Economic Transactions, Hearings before the Subcomm. on International Economic Policy and Trade of the Comm. on International Relations House of Representatives, 95th Cong. 135 (1977) (Statement of Irving Jaffe, Department of Justice) [hereinafter *Irving Jaffe Statement*].

[336] First War Powers Act, 1941, *supra* note 333, at ch. 593, § 301. Some have argued that the purpose of the 1941 amendment was not to allow for permanent confiscations but instead "to extend the so-called freezing powers, to add a flexibility of control, and to permit the use of foreign property in the best interests of the United States." Return of Confiscated Property, Hearings Before a Subcomm. Of the Comm. on the Judiciary United States Senate, 84th Cong. 376 (Statement of Kenneth S. Carlston, Professor of Law) (Nov 29-30, 1955 and Apr. 20, 1956). Regardless of Congress's intentions, the 1941 amendment resulted in the seizing and confiscation of substantial amounts of property by the U.S. government in ways that were permanent. Amendment of War Claims Act of 1048, Congressional Record-Senate, at 19192 (Sept. 12, 1962).

[337] William Reeves and Kenneth Carlston, *Return of Enemy Property*, 52 INT'L LAW AND THE POLITICAL PROCESS 48, 52 (1958). As of June 1975, assets seized and vested pursuant to TWEA totaled approximately $867 million. *Irving Jaffe Statement*, *supra* note 335.

[338] *See* Bertrand Gearhart, *Post-War Prospects for Treatment of Enemy Property*, 11 LAW AND CONTEMP. PROBLEMS 183, 183–85 (1945) (noting debates during World War II about the propriety of permanently confiscating the private property of foreign nationals).

War II,[339] Congress did consider returning some of those confiscated assets after the war.[340] In the case of Italy, against whom the United States had fought for only part of the war, Congress authorized the return of seized properties after the end of World War II both to Italy itself as well as its nationals.[341] In addition to these congressional efforts, scholars and advocates urged the U.S. government—particularly in the post-war period—to reject the permanent confiscation of seized private property and to return assets confiscated during the war.[342] Even amongst those who supported and promoted permanent confiscation, some refused to describe it as such[343] or downplayed its effects on the property rights of foreign nationals.[344]

2. Permanent Confiscations Today

The issue of permanent confiscation came up again during the 1977 hearings on amending the Trading with the Enemy Act and creating the International Emergency Economics Powers Act.[345] Ultimately, Congress decided to exclude the permanent confiscation power from IEEPA.[346] That decision was driven, at least in part, by concerns with the extraordinary nature and potential

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[339] Much like World War I, after World War II, Congress passed legislation ordering the U.S. government to retain all properties seized from Germany, Japan, or its nationals after December 7, 1941. War Claims Act, 62 Stat. 1246, Chapter 826, § 12, (July 3, 1948). Subject to certain exceptions, those properties were never returned to their original owners. Bess Glenn, *Private Records Seized by the United States in Wartime—Their Legal Status*, 25 SOCIETY OF AMERICAN ARCHIVISTS 399, 402–03 (1962).
[340] *E.g.*, Return of Confiscated Property, Hearings Before a Subcomm. of the Comm. on the Judiciary, U.S. Senate, 85th Cong. (1957); Return of Confiscated Property, Hearings Before a Subcomm. of the Comm. on the Judiciary, U.S. Senate, 84th Cong. (1955-1956). *See also Return of Property Seized During World War II: Judicial and Administrative Proceedings under the Trading with the Enemy Act*, 62 YALE. L. J. 1210, 1213–14 (1953) (observing that the "postwar period has seen a tempering of the policy of confiscation" and noting that Congress was considering returning properties to some former enemies).
[341] Joint Resolution to Provide for Returns of Italian Property in the United States and for Other Purposes, 61 Stat. 3962 (Aug. 5, 1947). The executive branch subsequently returned many of the seized properties belonging to Italy and its nationals. Glenn, *supra* note 339, at. 402.
[342] At the annual proceeding of the American Society of International Law in 1958, various individuals debated the merits of returning property owned by foreign nationals and confiscated by the U.S. government during and after World War II. Reeves and Carlston, *supra* note 337. As one group of advocates argued, "[w]e do not believe that confiscation of private property is or should be a policy adopted by this country." *Id.* at 49.
[343] Gearhart, *supra* note 338, at 186–87.
[344] *See, e.g.*, Amendment of War Claims Act of 1948, Congressional Record-Senate, at 19193 (Sept. 12, 1962) (suggesting that the U.S. government's decision to waive reparations payments from Germany and Japan, as well as Germany and Japan's acquiescence to the United States' permanent confiscation of assets belonging to their nationals, legitimized those confiscations).
[345] Emergency Controls on International Economic Transactions, Hearings before the Subcomm. on International Economic Policy and Trade of the Comm. on International Relations House of Representatives, 95th Cong., 208 (1977) [hereinafter *1977 IEEPA Hearings*].
[346] *Id.*

unconstitutionality of confiscations outside war time.[347] And while some have since argued that either the language of IEEPA[348] or subsequent Supreme Court decisions effectively give the President broad permanent confiscation powers under the statute as originally promulgated, the issue is far from settled.[349] Indeed, IEEPA's legislative history repeatedly and explicitly notes Congress's intention to omit the permanent confiscation power from the President's IEEPA authorities.[350]

That being said, in certain circumstances, permanent confiscations are still explicitly allowed under both TWEA and IEEPA. Under the amended TWEA statute—which, as previously mentioned, is exclusively limited to times of war—"any property or interest of any foreign country or national thereof shall vest, when, as, and upon the terms, directed by the President, in such agency or person as may be designated from time to time by the President, and upon such terms and conditions as the President may prescribe such interest or property shall be *held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States . . . .*"[351]

As for IEEPA, Congress amended the statute—as part of the USA PATRIOT Act passed in the wake of 9/11—to allow permanent confiscations where the United States is "engaged in armed hostilities or has been attacked by a foreign country or foreign nations."[352] In these circumstances, the President can "confiscate any property, subject to the jurisdiction of the United States, of any foreign person, foreign organization, or foreign country that he determines has

[347] *1977 IEEPA Hearings*, *supra* note 345, at 161. While Congress was particularly concerned with permanent confiscations that were "purely domestic" in nature, it still excluded all confiscatory authority from IEEPA even though the law did not apply to purely domestic situations. *Id.*
[348] *See The International Emergency Economic Powers Act: A Congressional Attempt to Control Presidential Emergency Power*, 96 HARVARD L. REV. 1102, 1108 (1983) (arguing that the power to "vest" foreign property under the older version of TWEA did not appear to "differ from . . . actions permitted by IEEPA[] . . . .").
[349] Some have argued that the Supreme Court's decision in *Dames and Moore v. Regan*, 453 U.S. 654 (1981)—which held that the President could use his powers under IEEPA to terminate outstanding civil judgments and claims against Iran and order the transfer of various Iranian assets, pursuant to an agreement between Iran and the United States—effectively recognizes that the President can confiscate sanctioned assets under the statute. Laurence Tribe & Jeremy Lewin, *$100 Billion. Russia's Treasure in the U.S. Should be Turned Against Putin*, N.Y. TIMES (Apr. 15, 2022), https://www.nytimes.com/2022/04/15/opinion/russia-war-currency-reserves.html [https://perma.cc/W5KC-VSAN]. As others have noted, however, while *Dames and Moore* does contain language suggesting the President can "permanently dispose" of assets frozen under IEEPA, the decision is arguably limited to the factual circumstances and questions raised by that particular case. Boyle, *supra* note 321.
[350] *See The International Emergency Economic Powers Act: A Congressional Attempt to Control Presidential Emergency Power*, *supra* note 348, at 1109 n. 36 ("Throughout IEEPA's legislative history, the omission of the vesting power repeatedly heads the list of the differences between IEEPA and TWEA.").
[351] 50 U.S.C.A. § 4305(b)(1)(B) (emphasis added).
[352] 50 U.S.C. § 1702(c).

planned, authorized, aided, or engaged in such hostilities or attacks against the United States."[353]

In addition to relying on TWEA and IEEPA, the government can permanently confiscate the property of individuals and entities that have violated sanctions laws through civil and criminal forfeiture proceedings. TWEA specifically provides for civil and criminal forfeiture of properties involved in violations of the statute.[354] Under the federal civil forfeiture statute, 18 U.S.C. § 981(a)(1) ("Section 981(a)(1)"), the government can also bring civil forfeiture claims against properties involved in violations of either IEEPA or TWEA or against assets traceable to such properties.[355] Similarly, the government can bring criminal forfeiture actions, pursuant to the federal criminal forfeiture statute, 18 U.S.C. § 982(a)(1), against properties involved in IEEPA or TWEA violations or against assets traceable to such properties.[356] Whether involving civil or criminal forfeiture, these confiscation actions can be brought against those designated by OFAC as Specially Designated Nationals,[357] as well as against individuals and entities that are not officially designated or otherwise directly sanctioned by the executive branch or named on OFAC's SDN list.[358]

Outside of these exceptions, the government is generally prohibited from permanently confiscating properties blocked under its sanctions authority. Private judgment enforcement efforts under TRIA and the Iran Threat Reduction Act arguably expand upon this limited and largely disfavored practice of permanent confiscation. They do so *both* by allowing private parties to participate in confiscation efforts *and* by permitting them to do so *even if* there are no armed hostilities with the terrorist party against whom plaintiffs have judgments. Together, this arguably increases the sheer volume of permanent confiscations of

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[353] *Id.* President George W. Bush used this IEEPA provision to permanently confiscate blocked property belonging to Iraq on the eve of the U.S. invasion of the country in March 2023. Exec. Order 13,290, Confiscating and Vesting Certain Iraqi Property, 68 F.R. 14307, (Mar. 20, 2003).

[354] 53 U.S.C. § 4315(b)(2) & (c). By contrast, IEEPA contains no provision for civil and criminal forfeiture proceedings connected to violations of the statute. *See* 50 U.S.C. § 1705 (listing civil and criminal penalties for IEEPA violations without mentioning civil or criminal forfeiture).

[355] Civil forfeiture actions involving TWEA and IEEPA can be brought under either Section 981(a)(1)(A) or (C), as both subsections are triggered by offenses that include violations of IEEPA and TWEA. *See* 18 U.S.C. § 981(a)(1)(A) & (C) (describing types of property subject to civil forfeiture as including properties involved in violations of 18 U.S.C. § 1956); 18 U.S.C. § 1956(c)(7) (defining offenses under the statute as including violations of TWEA and IEEPA).

[356] As with the federal civil forfeiture statute, the federal criminal forfeiture statute is triggered by violations of 18 U.S.C. § 1956, which includes violations of TWEA and IEEPA. 18 U.S.C. § 982(a)(1).

[357] *See, e.g.*, United States v. $148,500 of Blocked Funds in Name of Trans Multi Mechanics, Co., 2019 WL 1440882, at *4 (D.D.C. Mar. 29, 2019) (civil forfeiture action brought against listed SDNs for violations of IEEPA).

[358] *See, e.g.*, In re 650 Fifth Avenue and Related Properties, 934 F.3d 147 (2d Cir. 2019) (federal civil forfeiture action brought against certain entities not listed as SDNs for violating IEEPA); Cernuda v. Heavey, 720 F. Supp. 1544 (S.D. Fl. 1989) (TWEA criminal forfeiture action brought against a person not listed as an SDN or otherwise sanctioned).

sanctioned assets, while simultaneously expanding the circumstances under which confiscations can occur.[359]

These private permanent confiscation efforts are also likely to be more unconstrained than confiscations undertaken by the U.S. government. Government confiscations may, for example, be restricted or mitigated by foreign policy concerns. Because sanctions can be a powerful bargaining chip in relations with other states,[360] the U.S. government ostensibly takes this into account in deciding whether to permanently confiscate blocked assets, especially where sanctioned foreign states have an interest in the property. The same considerations may not weigh on private plaintiffs seeking compensation for their injuries. Similarly, while both TRIA plaintiffs and the U.S. government can proceed with on-going confiscation suits against entities or individuals even after sanctions against them have been removed,[361] the U.S. government may be less inclined to continue pursuing these suits—for example, out of a desire to reward changed behavior—once sanctions have been lifted.[362]

C. Triggering Sanctions Regimes and Investigations

In some cases, TRIA judgment enforcement actions may impact the reach of U.S. sanctions by prompting the U.S. government to block assets pursuant to new sanctions programs[363] or to open sanctions investigations. The most notorious example of a private judgement enforcement action triggering a new sanctions regime is the TRIA litigation targeting the Afghan central bank's assets, mentioned at the start of this Article.[364] *Peterson v. Islamic Republic of Iran*—which was also mentioned earlier—presents another, though less clear cut example, of a TRIA suit

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[359] Not all private judgement enforcement suits formally "expand" the number of permanent confiscations. Indeed, some cases, particularly under TRIA, have piggybacked off government civil forfeiture actions against the same blocked assets. *Estate of Levin*, 45 F.4th at 418–19; *Levin v. Miller*, No. 21-1116, 21-1411, 21-1680, 21-1827, 2022 WL 17574574 at *1 (2d Cir. Dec. 12, 2022).

[360] Barry Carter, *Effects and Effectiveness of Economic Sanctions*, 84 AM. SOC'Y INT'L L. PROC. 203, 208 (1990).

[361] Under OFAC regulations, "Any amendment, modification, or revocation . . . of any order, regulation, ruling, instruction, or license issued by. . . [OFAC] shall not, unless otherwise specifically provided, be deemed to affect . . . any civil or criminal suit or proceeding commenced or pending prior to such amendment, modification, or revocation." 31 C.F.R § 536.402 ("Section 536.402"). *See Stansell III*, 771 F.3d at 732–33 (holding that Section 536.402 applies to TRIA suits). On its face, this regulation would also seem to apply to Iran Threat Reduction Act claims.

[362] *See, e.g.*, OFAC, *Treasury Sanctions Central Bank of Venezuela and Director of the Central Bank of Venezuela*, U.S. Dep't of Treasury, Apr. 17, 2019, https://home.treasury.gov/news/press-releases/sm661[https://perma.cc/NJ8V-8JLW] (noting that "[t]he United States has made clear that the removal of sanctions is available for persons . . . who take concrete and meaningful actions to restore democratic order, refuse to take part in human rights abuses . . . and combat corruption in Venezuela.").

[363] While this section focuses on TRIA's ability to trigger new sanctions regimes, TRIA suits can also theoretically encourage the government to apply existing sanctions to new entities or individuals.

[364] *See supra* note 9 and accompanying text.

that may have prompted a new U.S. sanctions program. *Peterson* may have additionally played a role in the executive branch's decision to open a sanctions investigation against Clearstream—one of the financial institutions at the heart of the *Peterson* TRIA action.[365]

This section begins by examining how TRIA litigation can prompt the U.S. government to block assets pursuant to new sanctions programs, before looking at the ways TRIA suits can trigger government investigations into purported sanctions violations. Importantly, the purpose of this section is not to weigh in on the normative desirability of any sanctions program or investigation triggered by the TRIA suits described here. Rather this section attempts to demonstrate how, by triggering asset blocks and sanctions investigations, TRIA enforcement actions can play yet another role in shaping the scope and reach of U.S. sanctions.

1. Triggering New Sanctions Programs

This subpart begins with a discussion of the TRIA litigation involving Afghanistan's central bank before turning to the *Peterson* case and its potential role in triggering a new sanctions regime.

a. The Afghan Central Bank Case

On February 11, 2022, the Biden administration issued Executive Order 14,064 ("EO 14,064"), blocking the U.S.-based assets of Afghanistan's central bank pursuant to IEEPA.[366] While the bank's assets had not previously been subject to sanctions, EO 14,064 became necessary after a spate of TRIA suits were filed against those funds. These TRIA suits—which relate to underlying default judgments against the Taliban but not against Afghanistan or its central bank—threatened to deplete all the central bank's assets in the United States, totaling over

[365] *See supra* notes 220–21 and accompanying text.

[366] Exec. Order 14,064, *Protecting Certain Property of Da Afghanistan Bank for the Benefit of the People of Afghanistan*, 87 Fed. Reg. 31 (Feb. 11, 2022).

$7 billion,[367] and thereby contribute to Afghanistan's on-going humanitarian crisis.[368]

Understanding how those TRIA judgment enforcement suits triggered U.S. sanctions against the central bank funds requires appreciating how those funds came to be targeted by plaintiffs in the first place. When the Taliban assumed control over Afghanistan—which was not and still is not subject to U.S. sanctions—the group's sanctioned status impacted the new Afghan government's ability to access the country's central bank funds in the United States. Prompted, in part, by U.S. sanctions against the organization, the Biden administration informed U.S. financial institutions—soon after the Taliban took control in August 2021—that it did not recognize the group as the legitimate government of Afghanistan.[369] Under federal law, a foreign government must be recognized by the Secretary of State, in order to access its central bank assets in the United States.[370] Because of this requirement and the U.S. government's position regarding the Taliban, Afghanistan's central bank funds—most of which are held at the Federal Reserve Bank of New York—could not be accessed by the new government.[371] As a result, those funds were placed in a state of "suspended animation."[372] Still, however, the central bank's assets were not blocked.

With the assets beyond the Afghan government's reach, some plaintiffs with outstanding terrorism-related judgments against the Taliban saw an opportunity to strike. Shortly after the U.S. government's freeze on the central bank funds, those plaintiffs began filing writs of execution against the bank's assets with the U.S. District Court for the Southern District of New York.[373] According to

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[367] Scott Anderson, *What's Happening with Afghanistan's Assets*, LAWFARE (Feb. 18, 2022), https://www.lawfaremedia.org/article/whats-happening-afghanistans-assets [https://perma.cc/69EY-A26B].

[368] For more on Afghanistan's humanitarian crisis—including the role of U.S. and other sanctions—see *Economic Causes of Afghanistan's Humanitarian Crisis*, HUMAN RIGHTS WATCH (Aug. 4, 2022), https://www.hrw.org/news/2022/08/04/economic-causes-afghanistans-humanitarian-crisis [https://perma.cc/E27Y-R5RL], as well as *infra* note 490 and accompanying text. While the Biden administration framed EO 14,064 as an attempt to alleviate Afghanistan's humanitarian crisis, it did not acknowledge the ways U.S. sanctions policies have contributed to that crisis. Press Release, White House, Fact Sheet: Executive Order to Preserve Certain Afghanistan Central Bank Assets for the People of Afghanistan (Feb. 11, 2022), https://www.whitehouse.gov/briefing-room/statements-releases/2022/02/11/fact-sheet-executive-order-to-preserve-certain-afghanistan-central-bank-assets-for-the-people-of-afghanistan/ [https://perma.cc/BH2M-TQQC].

[369] Anderson, *supra* note 367.

[370] 12 U.S.C. § 632.

[371] Anderson, *supra* note 367.

[372] *Id.*

[373] *E.g.*, Emergency Motion for Writ of Execution, John Does 1 Through 7 v. The Taliban, 20-mc-00740, Entry 15 (S.D.N.Y Aug. 26, 2021) [hereinafter *Doe Writ*]; Writ of Execution, Havlish v. Bin Laden, 03-cv-9848, Entry 526-1 (S.D.N.Y. Sept. 13, 2021) [hereinafter *Havlish Writ*]. These underlying terrorism-related default judgments against the Taliban were brought under Section 2333 of the ATA, as well as under state tort law. *See* Complaint, John Does 1 through 7 v. Taliban et al, 3:20-cv-00681, Entry 1, ¶¶ 45–163 (N.D. Tex. Mar. 20, 2020) (raising claims under Section

plaintiffs, the bank's funds were blocked pursuant to U.S. sanctions against the Taliban and subject to execution under TRIA, in part, because the Taliban, as the new government of Afghanistan, had "tak[en] ownership and control of [the central bank] and its assets."[374]

As the writs quickly piled up, the Biden administration informed the court in September 2021 that it might file a statement of interest expressing its views on plaintiffs' efforts to execute against the central bank's funds.[375] On the very same day it issued EO 14,064, the U.S. government submitted that statement of interest.[376]

The text and purpose of EO 14,064, as well as the government's statement of interest in the on-going TRIA litigation, clearly demonstrate that U.S. sanctions against the Afghan central bank's assets were triggered by the TRIA suits. For example, in finding that the "preservation of certain property" of the Afghan central bank "is of the utmost importance to addressing [Afghanistan's humanitarian crisis]. . . and the welfare of the people of Afghanistan," the text of EO 14,064 strongly suggests that the need for sanctions is a direct result of "various parties, including representatives of victims of terrorism,. . .assert[ing] legal claims" against the central bank's funds.[377] Additionally, as others have argued, EO 14,064 is aimed, in part, at "prevent[ing] [terrorism] plaintiffs from collecting on any writs of attachment [against the Afghan central bank] without the executive branch having an opportunity to intervene."[378] Finally, one of EO 14,064's central goals is to segregate at least a portion of the Afghan central bank's assets so TRIA plaintiffs

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2333 against the Taliban); *supra* note 131 (noting that the *Havlish* plaintiffs underlying tort claim against the Taliban was based on state tort law).

[374] *Doe Writ, supra* note 373, at 8. According to the *Doe* plaintiffs, the Afghan central bank's assets were either the assets of the Taliban itself *or* the bank was the Taliban's agency or instrumentality since it was owned and controlled by the Taliban, which was now the government of Afghanistan. *Id.* at 1, 8. Either way, according to the *Doe* plaintiffs, the assets in question were blocked pursuant to existing sanctions against the Taliban. *Id.* at 7. Though the *Havlish* plaintiffs' writ did not explicitly mention the legal basis for execution, it clearly gave the factual basis—namely that the Taliban claimed to own and control the central bank. *Havlish Writ*, *supra* note 373, at Ex. C.

[375] The Biden administration addressed its letter to the judge considering the *Havlish Writ*. Letter addressed to Judge George B. Daniels from Rebecca S. Tinio re: Notice of Potential Participation of the United States Pursuant to 28 U.S.C. 517, Havlish v. Bin-Laden, 03-cv-09848 (S.D.N.Y. Sept. 16, 2021). The administration subsequently filed an analogous letter to the judge considering the *Doe Writ*. Letter addressed to Judge Katherine Polk Failla from Rebecca S. Tinio re: Notice of United States' Intent to Participate Pursuant to 28 U.S.C. 517, John Does 1 Through 7 v. The Taliban, 20-mc-00740 (S.D.N.Y. Oct 14, 2021).

[376] The Biden administration filed its Statement of Interest with the judge considering the *Havlish Writ*, as well as with the judge considering the *Doe Writ*. All references to the government's Statement of Interest are to the document submitted in *Havlish*. Statement of Interest of the United States of America, Havlish v. Bin-Laden, 03-cv-09848 (S.D.N.Y. Feb 11, 2022) [hereinafter *U.S. Statement of Interest*]. Both the U.S. Statement of Interest and EO 14,646 were issued on February 11, 2022. *See supra* note 366.

[377] EO 14,064, *supra* note 366.

[378] Anderson, *supra* note 367.

cannot reach them.[379] While EO 14,064 sanctions and blocks all the central bank's funds,[380] the Biden administration has used the executive order to place half those assets in a segregated account for the exclusive "benefit" of the Afghan people.[381] While TRIA plaintiffs can still litigate over the remaining central bank funds,[382] half the assets are being segregating, in part, to protect them from plaintiffs' judgment enforcement efforts, as the government's statement of interest makes clear.[383]

As a matter of law, the Biden administration's decision to sanction Afghanistan's central bank funds is significant. While sanctions do not transfer ownership to the U.S. government,[384] they do give the government control over blocked assets.[385] In the absence of EO 14,064, then, the administration would have no clear way, under existing law, of commandeering Afghanistan's central bank funds—a situation that became necessary as a result of TRIA litigation against those assets.

b. The *Peterson* Case

While the circumstances involved in the Afghan central bank litigation may be unusual, they demonstrate how TRIA suits can potentially trigger new sanctions programs. And though the Afghan case is one of the clearest instances of TRIA judgment enforcement efforts triggering sanctions, it is not the only example. *Peterson v. Islamic Republic of Iran* may have also contributed to the creation of a new sanctions regime.

As mentioned earlier, in June 2008, the *Peterson* plaintiffs filed their first writ of execution against an account held by Clearstream—allegedly on behalf of Iran's central bank—at a Citibank branch in New York, in order to enforce default judgments against Iran.[386] As plaintiffs' TRIA litigation over those assets continued, President Barack Obama issued EO 13,599, broadly sanctioning the Iranian government, its central bank, and all other Iranian financial institutions,

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[379] *Id.*
[380] EO 14,064, *supra* note 366, at § 1.
[381] *Id.*; OFAC, License No. DABReserves-EO-2022-886895-1, *Executive Order of February 11, 2022, "Protecting Certain Property of Da Afghanistan Bank for the Benefit of the People of Afghanistan"* (Feb. 11, 2022).
[382] *U.S. Statement of Interest*, *supra* note 376, at 2–5.
[383] In its statement of interest, the government asked the court to confirm that plaintiffs' writs of execution against the Afghan central bank would not apply to the segregated assets. *Id.* at 2–3.
[384] Smith ex rel. Estate of Smith v. Federal Reserve Bank of New York, 346 F.3d 264, 272 (2d Cir. 2003).
[385] *See Dames & Moore*, 453 U.S. at 673 (noting that the "congressional purpose in authorizing [sanctions] blocking orders is 'to put *control* of foreign assets in the hands of the President . . . .'"); *See Smith*, 346 F.3d at 272 (noting that sanctions "transfer[] possessory interest in the property" to the U.S. government) (emphasis removed).
[386] *See supra* notes 220–26 and accompanying text.

public and private.[387] Before EO 13,599, US financial institutions rejected most transactions involving Iranian financial institutions, including the country's central bank.[388] Those transactions were, however, not blocked.[389] Under EO 13,599, "transactions involving the Government of Iran, the Central Bank of Iran and all Iranian financial institutions that previously would have been rejected" were now officially blocked under sanctions law.[390]

While the expressly stated aims of EO 13,599 do not include assisting the *Peterson* plaintiffs' TRIA litigation, circumstantial evidence—including EO 13,599's impact on that case—suggest *Peterson* may have played some role in prompting U.S. sanctions against Iran's central bank.

First, one of the clearest triggers for EO 13,599 may have, itself, been a response to *Peterson*. As articulated by the Obama administration, EO 13,599 was aimed, in part, at implementing Section 1245 of the National Defense Authorization Act of 2012 ("Section 1245"), which had been signed into law in December 2011.[391] Section 1245 may have been a response to *Peterson*, at least to some extent. Amongst other things, Section 1245 required the President use IEEPA to "block and prohibit all transactions in all property and interests in property of an Iranian financial institution if such property and interests in property are in the United States, come within the United States, or are or come within the possession or control of a United States person."[392] In passing Section 1245, Congress also included language specifically directing the President to prohibit new correspondent bank accounts and enact tougher restrictions for maintaining correspondent bank accounts held by "foreign financial institution[s]" that have "knowingly conducted or facilitated any significant financial transaction with the Central Bank of Iran . . . ."[393] This language seems, at least, evocative of the Clearstream situation. And though the government was likely conducting its own Iran-related investigation into Clearstream at the time of Section 1245's passage, this language raises the possibility that *Peterson* may have been in the backdrop of Section 1245's, and therefore EO 13,599's, promulgation.[394]

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[387] *See supra* notes 244–45 and accompanying text.
[388] Press Release, U.S. Treasury Dep't, *Fact Sheet: Implementation of National Defense Authorization Act Sanctions on Iran* (Feb. 6, 2012), https://home.treasury.gov/news/press-releases/tg1409 [https://perma.cc/RCE9-QL3C] [hereinafter *Iran Sanctions Fact Sheet*].
[389] *Id.*
[390] *Id.* Where a transaction is rejected rather than blocked, the transaction is simply "not processed and returned to the originator." *OFAC Blocking and Rejecting Transactions*, *supra* note 44.
[391] *Iran Sanctions Fact Sheet, supra* note 388; *Fact Sheet, Section 1245 of the National Defense Authorization Act of 2012*, U.S. STATE DEP'T (Nov. 8, 2012), https://2009-2017.state.gov/e/eb/tfs/spi/iran/fs/200286.htm [https://perma.cc/B6F5-T3RH].
[392] National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, §1245(c), 125 Stat. 1647 (2011).
[393] *Id.* at § 1245(d)(1)(A).
[394] As mentioned below, in 2014, the Treasury Department entered into a civil settlement with Clearstream that also focused on the company's Iran-related activities at its correspondent account at Citibank. *See infra* note 403 and accompanying text. Based on information that OFAC shared

Second, and relatedly, prior to issuing EO 13,599, the executive branch was more than aware both of the *Peterson* case and the Clearstream account at Citibank. Indeed, the *Peterson* plaintiffs issued their 2008 writ against that account after learning from OFAC that Iran held an interest in it.[395]

Third, by clearly subjecting Iran's central bank assets to IEEPA sanctions, EO 13,599 created a windfall for the *Peterson* plaintiffs. In particular, it gave plaintiffs a stronger basis for their then-pending TRIA claim. That claim had previously been on shaky ground, as it was unclear whether the Citibank funds were blocked—as required by TRIA—when the *Peterson* plaintiffs initially attempted to execute against them.[396] By clearly blocking the assets of Iran's central bank, EO 13,599 bolstered plaintiffs' TRIA suit.[397] That the executive branch was aware of this outcome in issuing EO 13,599 seems likely. Indeed both media reports[398] and the Iranian government itself have suggested that EO 13,599 helped clear the path for plaintiffs' TRIA claim in *Peterson*.[399]

Finally, and perhaps most importantly, EO 13,599 paved the way for the Iran Threat Reduction Act. As previously mentioned, that legislation—which was passed only a few months after EO 13,599—was specifically aimed at helping the

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with the *Peterson* plaintiffs, it appears that Treasury was conducting an investigation into Clearstream's Citibank accounts as early as 2010. *See infra* note 395.

[395] *Bank Markazi Motion to Dismiss Second Amended Complaint*, *supra* note 228, at 4. Plaintiffs did not learn the identity of the Iranian government entity until 2010 when OFAC responded to a subpoena from plaintiffs and informed them that the central bank of Iran was the one that had a "*beneficial* ownership interest" in the account. *Id.* at 6.

[396] In a filing to the court before EO 13,599's passage, Bank Markazi challenged plaintiffs' TRIA claim, arguing that the bank's assets were not blocked pursuant to U.S. sanctions, as defined by TRIA. *Bank Markazi's Motion to Dismiss Amended Complaint*, *supra* note 220, at 12 n.7. While the *Peterson* plaintiffs also raised various arguments before EO 13,599's passage as to why TRIA did block the bank's assets, those arguments did not clearly establish that the central bank's assets were, in fact, blocked. *See, e.g., Memorandum of Law of the Peterson Plaintiffs in Opposition to Clearstream Banking, S.A.'s Second and Third Memoranda to Vacate Restraints*, Peterson v. Islamic Republic of Iran, 10-civ-04518, * 40-46, No. 835-2 (Nov. 11, 2010) (arguing that Bank Markazi's assets were blocked under TRIA by citing to regulations that broadly prohibit providing goods and services to Iran but that did not clearly restrain the bank's assets). By directly and clearly blocking the assets of Iran's central bank, EO 13,599 removed this barrier to using TRIA to execute against Bank Markazi's funds.

[397] As described above, the *Peterson* TRIA claim still was not a sure thing, even after EO 13,599's passage, which is why the Iran Threat Reduction Act was passed. *See supra* notes 227–29 and accompanying text.

[398] *See* Laura MacInnis, *Obama tightens Iran sanctions over bank "deception"*, REUTERS (Feb. 6, 2012), https://www.reuters.com/article/us-iran-usa-assets/obama-tightens-iran-sanctions-over-bank-deception-idUKTRE8151BT20120206 [https://perma.cc/HSX6-9N7Z] (noting that EO 13,599 may "have an impact" on the *Peterson* litigation).

[399] This observation was made by Iran in a case it brought in the International Court of Justice (ICJ) against the United States, in connection with the *Peterson* litigation. *Certain Iranian Assets* (Iran v. U.S.), Application Instituting Proceedings, ¶ 20 (June 14, 2016), https://www.icj-cij.org/sites/default/files/case-related/164/164-20160614-APP-01-00-EN.pdf [https://perma.cc/KEN5-39CP].

Peterson plaintiffs execute against Iran's central bank funds.[400] Under the Iran Threat Reduction Act, targeted assets have to be "blocked asset[s] (whether or not subsequently unblocked), or . . . asset[s] that would be blocked if the asset[s] were located in the United States . . . ."[401] Of course, thanks to EO 13,599, Iran's central bank assets were blocked by the time the Iran Threat Reduction Act was passed. Now, one might wonder whether Congress needed the assets to be blocked, in order to direct their disposition as a legal matter, or whether Congress merely described them as such because EO 13,599 had already blocked the assets. Whatever its reasoning, Congress chose to require the assets in question to be blocked—making EO 13,599 an integral part of the Iran Threat Reduction Act, as the Supreme Court itself has noted,[402] and raising the possibility that EO 13,599 was instituted, in part, to facilitate the Iran Threat Reduction Act's framework.

2. Triggering Sanctions Investigations

In addition to triggering new sanctions regimes, TRIA judgment enforcement actions can prompt government sanctions investigations—as demonstrated, again, by the *Peterson* case. Based on publicly available information, *Peterson* appears to have contributed to, at least, one Department of Justice ("DOJ") investigation into Clearstream that became public in mid-2014.

The Treasury Department had previously entered into an agreement with Clearstream in January 2014 to settle civil claims relating to violations of sanctions governing Iran-related transactions arising from the same correspondent account at Citibank that was the subject of *Peterson*.[403] Shortly after that settlement agreement was announced, reports emerged that the DOJ was pursuing a separate criminal investigation against Clearstream.[404]

While there is little publicly available information about the criminal investigation or its current status, what *is* available strongly suggests *Peterson* helped trigger the criminal probe. For example, according to one report, in April 2014, DOJ attorneys subpoenaed the *Peterson* plaintiffs' lead attorney, demanding "all records concerning Clearstream's possession or control of property beneficially

[400] *See supra* note 231 and accompanying text.
[401] *See supra* note 237 and accompanying text.
[402] *See supra* note 246 and accompanying text.
[403] Although the settlement agreement did not mention the specific U.S. bank involved in Clearstream's regulatory violations, the facts strongly suggest that Clearstream's Citibank account was at the heart of the government's suit. Settlement Agreement, *In re Clearstream Banking*, IA-673090, U.S. DEP'T OF TREASURY (Jan 22, 2014), https://ofac.treasury.gov/media/13466/download?inline [https://perma.cc/YL5A-RK8Q] [hereinafter *Cleartstream Settlement Agreement*].
[404] Patricia Hurtado, *Clearstream Banking and Iran Central Bank Probed by U.S.*, BLOOMBERG (Apr. 1, 2014), https://www.bloomberg.com/news/articles/2014-04-01/clearstream-banking-and-iran-central-bank-probed-by-u-s [https://perma.cc/WQN8-GTLS]. The civil settlement did not bar the DOJ from prosecuting Clearstream for criminal activity. *Clearstream Settlement Agreement*, *supra* note 403, at ¶ 22.

owned by Iran or Bank Markazi," "services rendered by Clearstream for the benefit of Iran or Bank Markazi," and "copies of all filings [the lead attorney] made in the [*Peterson*] case."[405] According to another report from several years later about the Clearstream investigation, much of the government's evidence for the criminal probe came from "civil suits brought by families of U.S. Marines killed in a 1983 terrorist bombing in Lebanon"—a clear reference to the *Peterson* case.[406]

As this section has demonstrated, TRIA and Iran Threat Reduction Act suits can help shape the scope and reach of U.S. sanctions policy. From influencing judicial interpretations of sanctions programs, to expanding the circumstances under which sanctioned assets can be permanently confiscated, to triggering new sanctions programs and investigations, suits under TRIA and the Iran Threat Reduction Act provide private plaintiffs with a unique opportunity to inform, and in some cases even transform, U.S. sanctions policy.

Building on these insights, the next section explores the ways in which private plaintiffs bringing TRIA and Iran Threat Reduction Act claims can exacerbate some of the worst consequences of U.S. sanctions.

IV. EXACERBATING THE DOWNSIDES OF U.S. SANCTIONS

In addition to impacting the scope and reach of U.S. sanctions, suits under TRIA and the Iran Threat Reduction Act exacerbate some of the most negative aspects of U.S. sanctions regimes. While there are a host of downsides associated with sanctions, this section focuses on several legal and policy issues that are particularly relevant to such suits. These include (1) the civil liberties problems raised by U.S. sanctions programs; (2) the discriminatory impact of U.S. sanctions, particularly when it comes to terrorism-related sanctions regimes; (3) the ways U.S. sanctions can deplete the wealth of states impacted by sanctions—particularly in the Global South—and transfer wealth to the United States; and (4) the problematic targeting of central bank assets by some U.S. sanctions programs. As this section demonstrates, TRIA and Iran Threat Reduction Act suits exacerbate and often affirmatively add to these sanctions downsides.

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[405] Hurtado, *supra* note 404. While the DOJ subpoena was issued against the attorney in his capacity as lead attorney in the *Peterson* attachment proceeding that started in 2008, the criminal investigation appears to have focused, at least in part, on the bank account at JP Morgan that is the subject of the second *Peterson* attachment proceeding. That account was also held by Clearstream, allegedly on behalf of Bank Markazi. *See* Letter from Liviu Vogel to Judge Katherine B. Forrest (Mar. 31, 2014), re: Grand Jury Subpoena, Document filed by Deborah D. Peterson, No. 553, Peterson v. Islamic Republic of Iran, No. 1:10-cv-04518 (S.D.N.Y. June 08, 2010) (describing and attaching DOJ subpoena to lead attorney in first *Peterson* attachment proceeding); Greg Garrell & Christian Berthelsen, *Deutsche Boerse Unit's Iran Ties Said to Face Renewed Probe,* BQ PRIME (Feb. 21, 2017), https://www.bqprime.com/amp/business/u-s-said-to-rekindle-sanctions-probe-of-deutsche-boerse-unit [https://perma.cc/2M65-R3AN] (noting that the DOJ criminal investigation against Clearstream focuses on its role "as an intermediary between Bank Markazi . . . and JP Morgan . . . "). Like the 2008 proceeding, the 2013 *Peterson* attachment proceeding was partially based on TRIA. *Peterson*, 876 F.3d at 89.
[406] Garrell & Berthelsen, *supra* note 405.

The first part of this section, Part IV.A., focuses on the civil liberties issues raised by U.S sanctions and examines the ways private judgment enforcement suits reinforce those problems. The second part of this section, Part IV.B, focuses on the policy-related downsides of U.S. sanctions and explores the ways TRIA and Iran Threat Reduction Act suits exacerbate and otherwise contribute to such negative effects.

A. Civil Liberties Issues

There are various civil liberties problems raised by the U.S. government's sanctions authority—issues that primarily relate to the government's processes for designating sanctioned individuals and non-sovereign entities, as well as the effects of those designations.[407] Private judgment enforcement suits—particularly under TRIA—exacerbate those civil liberties concerns while also raising their own separate civil rights problems.[408]

While there are a host of different sanctions designations, this section focuses on the government's terrorism-related designation categories.[409] The executive branch primarily uses three designations for individuals and non-state entities involved in terrorism-related activities. These designations include the FTO label, the Specially Designated Terrorist (SDT) label, and the Specially Designated Global Terrorist (SDGT) label.[410] FTOs, SDTs, and SDGTs are all part of the Specially Designated Nationals list maintained by OFAC.[411]

Even though TRIA actions can and do implicate non-terrorism-related sanctions regimes,[412] these three programs are at the heart of many of the

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[407] It is worth mentioning a potentially relevant civil liberties issue raised by some scholars, but not explored here—namely, that foreign states may be entitled to constitutional protections, specifically under the Fifth Amendment's procedural due process clause. *See generally* Ingrid Wuerth, *The Due Process and Other Constitutional Rights of Foreign Nations*, 88 FORDHAM L. REV. 633 (2019) (providing an originalist argument for why foreign states are "persons" under the Fifth Amendment and are thereby entitled to due process). Under this theory, foreign sovereigns would likely have at least some civil liberties claims with respect to how U.S. sanctions are applied to them. As far as the courts are concerned, however, foreign sovereigns do not enjoy constitutional protections under the Fifth Amendment or otherwise. *Id.* at 646–47.

[408] While the Iran Threat Reduction Act may raise some of the same civil liberties issues discussed in this section—relating both to the designation of Iran's central bank as well as the blocking of its assets—the statute is not discussed here, given its limited reach.

[409] Much of this section on the civil liberties problems raised by terrorism-related sanctions designations is drawn from my article, *The Private Enforcement of National Security*. *See generally* Jamshidi, *supra* note 19.

[410] *See OFAC 16th Asset Report*, *supra* note 211, at 4–5. As noted below, the SDT designation has been folded into the SDGT designation. *See infra* note 434 and accompanying text.

[411] Jamshidi, *supra* note 19, at 810, 810 n. 403.

[412] For example, TRIA cases have implicated Executive Order 13,382, which blocks the property of "weapons of mass destruction proliferators and their supporters," Exec. Order No. 13382, 70 Fed. Reg. 38567 (June 28, 2005); Executive Order 13,599, which blocks the property of the Iranian government and Iranian financial institutions, *supra* notes 244–45 and accompanying text; and regulations that block the property of Specially Designated Narcotics Traffickers, 31 CFR §

underlying judgments enforced through TRIA, and are often the basis for blocking assets targeted by TRIA suits.[413] This section begins with background on the three terrorism-related sanctions designations and discusses the civil liberties issues they raise. It ends by describing how TRIA suits reinforce those civil liberties problems and raise their own unique civil rights challenges.

Admittedly, most of the constitution's civil liberties protections restrict the actions of government, not private actors.[414] Nevertheless, actions taken by private parties can still threaten the values protected by civil rights laws. As Erwin Chemerinsky has described it, even though the government is not directly involved, civil liberties "can be chilled and lost just as much through private [actions] as through public ones."[415] At minimum, TRIA suits create this chilling effect—though in some situations they may do more than this.[416]

The purpose of this section is not to catalogue which civil rights claims involving U.S. sanctions designations have or have not been successful with the courts—while some have succeeded, many have not.[417] Instead, the point is to underscore the ways TRIA judgment enforcement actions exacerbate and affirmatively add to the civil liberties threats posed by U.S. sanctions regimes.

1. Background on the Specially Designated Terrorist (SDT), Foreign Terrorist Organization (FTO), and Specially Designated Global Terrorist (SDGT) Designations

The oldest of the three terrorism-related designations, the Specially Designated Terrorist label was created in 1995 by President Bill Clinton, pursuant to Executive Order 12,947 ("EO 12,947" or "SDT order").[418] The order designates various Palestinian and Jewish-Israeli groups for threatening the "Middle East peace process" and blocks all "property and interests in property" held by those SDTs in the United States or that come within the possession or control of U.S.

598.314 ("Section 598.314"). *See Kirschenbaum I*, 830 F.3d at 121 (TRIA case implicating EO 13,599); Bennett v. Franklin Res., Inc., 360 F. Supp. 3d 972, 980–82 (N.D. Cal. 2018) (TRIA case implicating EOs 13,382 and 13,599); Siman v. Ocean Bank, N.A., 2016 WL 739659, at *1 (Feb. 25, 2016) (TRIA case implicating Section 598.314).

[413] *See infra* notes 446–47 and accompanying text.

[414] John Watts, *Tyranny by Proxy: State Action and the Private Use of Deadly Force*, 89 NOTRE DAME L. REV. 1237, 1239 (2014).

[415] Erwin Chemerinsky, *Rethinking State Action*, 80 NW. U. L. REV. 503, 510 (1985).

[416] As discussed below, TRIA suits may directly implicate certain Fifth Amendment protections, especially when it comes to the Due Process Clause. *See infra* notes 450–52 and accompanying text. TRIA suits may also violate the Fifth Amendment's Taking Clause. *See infra* notes 453–59 and accompanying text.

[417] *See* Erich Ferrari, *Shooting in the Dark, Blindfolded with No Bullets: The OFAC SDN Reconsideration Process*, ASPATORE 1, 10–15 (2016) (describing varying rates of success for constitutional claims brought against FTO, SDT, and SDGT listings).

[418] Exec. Order No. 12,947, 60 Fed. Reg. 5079 (Jan. 23, 1995).

persons.[419] The order empowers the Secretary of State, in consultation with the Treasury Secretary and Attorney General, to designate additional persons or entities as SDTs where they have committed or "pose a significant risk of committing" acts of violence threatening the "Middle East peace process" or provide material support to such acts of violence.[420] Though the order focuses on groups in Israel/Palestine, it can and has been used to designate U.S. persons.[421]

In 1996, a year after the SDT order was issued, Congress stepped in and created the Foreign Terrorist Organization designation.[422] Unlike the SDT designation, the FTO designation can only be applied to foreign groups. Pursuant to federal statute, the Secretary of State can label a group an FTO as long as it: (a) "is a foreign organization"; (b) "engages in terrorist activity . . . or terrorism . . . or retains the capability and intent to engage in terrorist activity or terrorism;" and (c) "threatens the security of [U.S.] nationals or the national security of the United States."[423] Once an entity has been designated as an FTO, the Treasury Department may block its assets and those of its agents, as well as financial transactions involving those assets.[424]

The Specially Designated Global Terrorist category is the most recently established of the three designations.[425] Prompted by the 9/11 attacks, President George W. Bush issued Executive Order 13,224 ("EO 13,244" or "SDGT order") on September 23, 2001, designating twenty-seven SDGTs.[426] Much like the other designations, all property or interests in property held in the United States by designated SDGTs or SDGT property or interests that come within the possession or control of U.S. persons are blocked pursuant to EO 13,244.[427] The SDGT list is arguably the most expansive of the three lists, since it is directed at the general

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[419] *Id.* at § 1(a). The order also prohibits all transactions and dealings with SDTs by U.S. persons or persons inside the United States. *Id.* at § 1(b).
[420] *Id.* at § 1(a)(ii).
[421] Under EO 12,947, persons in the United States, including U.S. citizens, can be designated where they are "owned or controlled by" or "act for or on behalf of" designated SDTs. *Id.* at § 1(a)(iii); *see* Holy Land Foundation for Relief and Development v. Ashcroft, 219 F. Supp. 2d 57, 64 (D.D.C. 2002), *aff'd* 333 F.3d 156 (D.C. Cir. 2003) (case involving a U.S. non-profit organization designated as an SDT) [hereinafter *HLF*].
[422] Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104–132, 110 Stat 1214, Title III, §302(a) (Apr. 24, 1996).
[423] 8 U.S.C. § 1189(a)(1)(A)–(C). In addition to this statutory language, there is some limited public guidance on the FTO designation process. *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-15-629, COMBATTING TERRORISM: FOREIGN TERRORISM ORGANIZATION DESIGNATION PROCESS AND U.S. AGENCY ENFORCEMENT ACTIONS 6–8 (2015), https://www.gao.gov/assets/gao-15-629.pdf [https://perma.cc/W4NJ-F6YG] (describing the State Department's six-step process for designating FTOs) [hereinafter *GAO Combatting Terrorism Report*].
[424] 8 U.S.C. § 1189(a)(2)(C); AUDREY KURTH CRONIN, CONG. RSCH. SERV., RL32120, THE "FTO LIST" AND CONGRESS: SANCTIONING DESIGNATED FOREIGN TERRORIST ORGANIZATIONS 2–3 (2003), https://irp.fas.org/crs/RL32120.pdf [https://perma.cc/ERC9-3XTR].
[425] Exec. Order No. 13,224, 66 Fed. Reg. 49079 (Sept. 23, 2001).
[426] *Id.*
[427] *Id.* at § 1. EO 13,224 prohibits all transactions and dealings with SDGTs by U.S. persons or persons inside the United States. *Id.* at § 2(a)–(b).

threat of foreign terrorism and is neither limited to foreign organizations[428] nor to those individuals or groups impacting the "Middle East peace process."[429]

Under EO 13,224, both the Secretary of Treasury and Secretary of State can, in consultation with other agencies, designate additional SDGTs.[430] These additional designees include any persons determined to be owned, controlled, or acting for or on behalf of SDGTs; any persons determined to have committed or to pose a significant risk of committing acts of terrorism threatening "the security of U.S. nationals or the national security, foreign policy, or economy of the United States;" and any persons determined, subject to certain exceptions, to have "assist[ed] in, sponsor[ed], or provid[ed] financial, material, or technological support for . . . such acts of terrorism or . . . [SDGTs]" or who are "otherwise associated" with SDGTs.[431] The basis for SDGT designation can be quite loose. For example, "mere *association* [with a SDGT]—quite apart from demonstrated material support—is sufficient" to designate a target as an SDGT and freeze its assets.[432]

In 2019, President Donald Trump issued Executive Order 13,886 ("EO 13,886"), which amended EO 13,224 to expand the range of persons subject to designation as Specially Designated Global Terrorists.[433] EO 13,886 also revoked EO 12,947 and incorporated the existing Specially Designated Terrorist list into the SDGT list under EO 13,224.[434]

2. Civil Liberties Concerns

In ways that are quite similar if not identical, the FTO, SDT, and SDGT designations potentially impact the First, Fourth, and Fifth Amendment rights of designated individuals and entities[435] that are U.S. nationals or have substantial connections to the United States.[436] These designations also potentially implicate

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[428] As with the SDT designation, EO 13,224 can and has been used to designate U.S. persons. *Id.* at § 1(c)–(d); *see HLF*, 219 F. Supp. 2d at 64 (case involving a U.S. non-profit organization designated as an SDGT).

[429] Kathryn A. Ruff, *Scared to Donate: An Examination of the Effects of Designating Muslim Charities as Terrorist Organizations on the First Amendment Rights of Muslim Donors*, 9 N.Y.U. J. LEGIS. & PUB. POL'Y 447, 455 (2005).

[430] EO 13,224, *supra* note 425, at § 1(b)–(d). President Bush amended EO 13,224 in January 2003 and gave the Secretary of Homeland Security authority to make SDGT designations as well. Exec. Order. 13,284, 68 Fed. Reg. 4075 at § 4 (Jan. 23, 2003).

[431] EO 13,224, *supra* note 425, at § 1(b)–(d).

[432] Laura Donohue, *Constitutional and Legal Challenges to the Anti-Terrorist Finance Regime*, 43 WAKE FOREST L. REV. 643, 650 (2008).

[433] Exec. Order 13,886, 84 Fed. Reg. 48041 at § 1 (Sept. 9, 2019).

[434] *Id.* at preamble, § 1.

[435] *See* Ferrari, *supra* note 417, at 10–15 (describing the similar constitutional problems facing individuals and entities designated as FTOs, SDTs, and SDGTs regardless of the authority they are designated under).

[436] *See id.* at 13–14 (noting that designated entities that have "substantial connections" to the United States may be entitled to First, Fourth, and Fifth Amendment protections). There may be

the First, Fourth, and Fifth Amendment rights of third parties that are U.S. nationals or that otherwise have substantial connections to this country.

Starting with the Fifth Amendment rights of designated individuals and groups, the FTO, SDT, and SDGT designation processes undermine the procedural due process rights of designees. They do this by depriving these individuals and organizations of an opportunity to challenge their designations before they are made[437] or to obtain meaningful review, either administratively or judicially, post-designation.[438] The fact that designees are not typically provided with the evidentiary basis for their designations in a timely manner (or at all) also undermines their procedural due process rights.[439] OFAC's freezing and blocking of assets—particularly where that blocking has become "long term"—may further violate designees' rights under the Fifth Amendment's Takings Clause, which obligates the government to provide "just compensation" for the taking of private property for public use.[440]

As for the Fourth Amendment, OFAC's practice of blocking assets in the United States without obtaining a warrant supported by probable cause undermines the Fourth Amendment right of designees to be free of unreasonable searches and

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good reasons to extend constitutional protections to foreign individuals and organizations designated and subject to sanctions by the U.S. government, but who do not have "substantial connections" to the United States. Those arguments are not, however, explored here.

[437] *Id.* at 12; Micah Wyatt, *Designating Terrorist Organizations: Due Process Overdue*, 39 GOLDEN GATE UNIV. L. REV. 221, 240–41 (2009).

[438] While designated entities and individuals can seek post-designation review, those processes provide weak civil rights protections for designees. For example, FTOs have two ways of challenging their designations after the fact. First, an FTO may seek revocation of its designation with the Secretary of State. 8 U.S.C. § 1189(a)(4). Second, and alternatively, the FTO may seek judicial review of its designation. 8 U.S.C. § 1189(c). Both avenues have been criticized as inadequate to protect the rights of designees and as substantially favoring the government. Julie B. Shapiro, *The Politicization of the Designation of Foreign Terrorist Organizations: The Effect on the Separation of Powers*, 6 CARDOZO PUB. L. POL'Y & ETHICS J. 547, 573–76, 586–92 (2008). Similarly, while SDTs and SDGTs may ask OFAC to reconsider their designation and pursue judicial review, those processes also provide designated entities with few civil liberties protections and substantially favor OFAC. Ferrari, *supra* note 417, at 6–10.

[439] Ferrari, *supra* note 417, at 7, 12. These designation processes may also violate the right to substantive due process under the Fifth Amendment. *See HLF*, 219 F. Supp. 2d at 77 (case in which plaintiff raised Fifth Amendment substantive due process claims relating to its designation as an SDT and SDGT, alleging the government had behaved in an "arbitrary and capricious" fashion in making those designations); Sahar Aziz, Note, *The Laws on Providing Material Support to Terrorist Organizations: The Erosion of Constitutional Rights or a Legitimate Tool for Preventing Terrorism?*, 9 TEX. J. ON C.L. & C.R. 45, 69–73 (2003) (arguing that the FTO designation process violates the Fifth Amendment's substantive due process provision by disproportionately targeting Arab and Muslim groups).

[440] U.S. CONST. amend. V; *see* Ferrari, *supra* note 417, at 13 (describing Takings Clause claims challenging the freezing and blocking of assets owned by designated entities). As described below, while Takings Clause suits challenging OFAC blocking orders have mostly failed, courts have noted that a Takings Clause claim may be viable where property has been frozen or blocked by U.S. sanctions for the "long-term" thereby "ripen[ing] into a vesting of property in the United States." *HLF*, 219 F. Supp. 2d at 78; *infra* note 453.

seizures.[441] Finally, the FTO, SDT, and SDGT designations potentially raise First Amendment problems where they prevent designated organizations and individuals from engaging in speech and advocacy-related work.[442]

As for third parties that are U.S. nationals or have substantial connections to the United States, their constitutional rights can be similarly affected by terrorism-related sanctions designations. For example, by "insulating" government designation from meaningful judicial review, FTO, SDT, and SDGT designation processes can impact the Fifth Amendment procedural due process rights of third parties who wish to support those groups.[443] The designations can also effectively erode a third party's First Amendment right to speech and association by creating an atmosphere that dissuades them for donating money or giving other support to the speech and advocacy-related activities—including charitable work—of designated persons or others supposedly connected to them.[444] Finally, under some of these designation authorities, third parties engaging in First Amendment-protected activity can become susceptible to designation themselves and all the civil liberties violations that may entail.[445]

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[441] Ferrari, *supra* note 417, at 11–12; Al Haramain Islamic Foundation, Inc. v. U.S. Dep't Treasury, 686 F.3d 965, 990–95 (9th Cir. 2012). As with other SDN designations, FTO, SDT, and SDGT designations open designated entities up to the warrantless blocking of their property by OFAC. Chris Jones, Note, *Caught in the Crosshairs: Developing a Fourth Amendment Framework for Financial Warfare*, 68 STAN. L. REV. 683, 698 (2016).

[442] *HLF*, 219 F. Supp. 2d at 80–82. Being designated under any of the sanctions authorities discussed here effectively prevents an individual or group from operating in the United States, not only by blocking its assets, but also by facilitating criminal prosecutions and civil penalties against those who provide material support to the group, amongst other consequences. *GAO Combatting Terrorism Report*, *supra* note 423, at 11; Aziz, *supra* note 439, at 90–91; *see Al Haramain Islamic Found.*, 686 F.3d at 980 (noting that "[f]or domestic organizations . . . a [sanctions] designation means that it [effectively can] conduct[] no business at all" in the United States). Between triggering asset freezes and criminalizing all forms of material support to designated persons—which can include First Amendment protected activity—FTO, SDT, and SDGT designations make it effectively impossible for a designated individual or group to engage in First Amendment activity in the United States, whether in the form of political advocacy or otherwise.

[443] Humanitarian Law Project v. Reno, 205 F.3d 1130, 1136 (9th Cir. 2000); Jamshidi, *supra* note 19, at 823, 823 n. 469.

[444] Ruff, *supra* note 429, at 472–74. *See also* Aziz, *supra* note 439, at 85–87 (arguing that the donation of humanitarian aid "is [a] clear expression of [a donor's] political, ethical, or religious associations" even when given to an FTO and should be protected by the First Amendment right to speech and association).

[445] For example, assuming they otherwise satisfy the relevant statutory requirements, foreign third parties with substantial connections to the United States who provide certain kinds of material support—including those involving First Amendment-protected activity—to FTOs are potentially susceptible to FTO designation. *See* 8 U.S.C. § 1189(a)(1) (listing substantive requirements for designating group as FTOs, including a requirement that the terrorist group engage in terrorist activity as defined in 8 U.S.C. § 1182(a)(3)(B)); 8 U.S.C. § 1182(a)(3)(B)(iv) (defining terrorist activity to include certain kinds of material support that may raise First Amendment concerns). As mentioned earlier, under EO 13,224, a person or entity can also be designated as an SDGT if they provide material support to or are "otherwise associated with" other SDGTs—all of which can be triggered by First Amendment-protected pursuits. E.O. 13,224, *supra* note 425, at § 1(d); Heidi Kitrosser, *Free Speech and National Security Bootstraps*, 86 FORDHAM L. REV. 509, 520–23 (2017).

3. TRIA

In various ways, TRIA suits both exacerbate many of these civil liberties problems with the terrorism-related sanctions designations and raise their own constitutional concerns.

To begin, TRIA both indirectly and directly reinforces the civil liberties problems endemic to the designation programs. In terms of TRIA's indirect effects, the entities and/or individuals designated as SDTs, SDGTs, and FTOs are sometimes named as defendants in the underlying judgments TRIA enforces. This is particularly true for suits under the ATA's private right of action, Section 2333.[446] In those cases, TRIA effectively enforces judgments against individuals or entities that have been designated pursuant to sanctions programs with serious civil liberties problems—thereby indirectly reinforcing those infirmities.

As for their direct effects, TRIA suits directly implicate the designations schemes' civil rights shortcomings where they target assets blocked by those schemes. The terrorism-related designations—especially the SDGT sanctions scheme—are often the basis for blocking assets that are then targeted by TRIA plaintiffs.[447] Assuming their suits otherwise satisfy TRIA's requirements, plaintiffs do not need to prove the "merits or defend the OFAC designation or the sources of any blocked asset."[448] Nor do they need to await the outcome of efforts by designated persons or entities to have their designations removed or their assets unblocked.[449] In other words, if not for the designations' myriad civil liberties

[446] *See* Jamshidi, *supra* note 19, at 809–10 (noting the role of FTO, SDGT, and SDT designations in cases brought under Section 2333 of the ATA).
[447] *See, e.g.*, *Estate of Levin*, 45 F.4th at 418 (TRIA case involving assets blocked pursuant to the SDGT sanctions authority); *Doe*, 899 F.3d at 154–55 (TRIA case involving assets blocked pursuant to the SDGT sanctions authority); U.S. v. All Funds on Deposit with R.J. O'Brien Associates, 783 F.3d 607, 612 (7th Cir. 2015) (TRIA case involving assets blocked pursuant to the SDGT sanctions authority); U.S. v. Holy Land Foundation for Relief and Development, 722 F.3d 677, 682 (5th Cir. 2013) (TRIA case involving assets blocked pursuant to SDT and SDGT sanctions authorities); *Franklin Resources*, 360 F. Supp. 3d at 982 (TRIA case involving assets blocked, in part, pursuant to SDGT sanctions authority); Stansell v. Revolutionary Armed Forces of Colombia, 2010 WL 11508044, at *4 (M.D. Fl. Dec. 16, 2010) (TRIA case involving assets blocked, in part, pursuant to SDGT sanctions authority) [hereinafter *Stansell I*]. Because IEEPA is the basis for the executive orders creating the SDT and SDGT designations, assets blocked pursuant to those orders can be attached using TRIA. EO 12,947, *supra* note 418, preamble; EO 13,224, *supra* note 425, preamble. IEEPA is not, however, the basis for the FTO designation framework, which was created by Congress and not the President. While this may appear to place FTO assets beyond the reach of TRIA, in reality, that is far from the case. TRIA is still regularly used against the assets of FTOs or the agencies or instrumentalities of FTOs, since those assets are also often blocked by an IEEPA authorized sanctions program, like the SDGT or SDT program. *See* Stansell v. Revolutionary Armed Forces of Colombia, 2015 WL 13325432, at *4 (M.D. Fl. Feb. 17, 2015) ("TRIA applies to assets of agencies or instrumentalities of an FTO whose assets are blocked under an IEEPA Executive Order"). Indeed, entities designated as FTOs are often concurrently designated as SDTs or SDGTs. Jamshidi, *supra* note 19, at 811 n.406.
[448] *Stansell I*, 2010 WL 11508044, at *5.
[449] *Id.*

problems—the absence of Fifth Amendment protections, the evisceration of the Fourth Amendment warrant requirement, and the government's broad authority to sanction including for First Amendment protected activity—TRIA plaintiffs would arguably have far fewer assets available for execution.

In addition to these concerns, TRIA potentially creates its own civil rights deprivations with respect to the Fifth Amendment's Due Process and Takings Clauses. Starting with the Due Process Clause, the Fifth Amendment's procedural due process protections do not generally require a plaintiff to serve post-judgment motions on judgment debtors—such as motions relating to writs of execution—which generally give defendants notice and provide them with an opportunity to be heard on post-judgment matters.[450] According to the courts, that rule also applies to TRIA suits, at least where the judgment debtors are the terrorist parties themselves and not their agencies or instrumentalities.[451] In those situations, TRIA suits potentially subject terrorist parties to multiple levels of due process violations—first at the hands of the executive branch, which designates them via processes that arguably deprive them of their Fifth Amendment rights, and second at the hands of TRIA plaintiffs who are not required to notify them of their TRIA enforcement actions or provide them with an opportunity to be heard.[452]

TRIA may also raise Takings Clause concerns that are even more serious than the Takings Clause issues raised by OFAC's asset blocking. In rejecting Takings Clause claims brought against OFAC blocking orders, courts have held that those orders do not constitute takings, in part, because they are "temporary deprivations that do not vest the assets in the Government."[453] The implication, of

[450] *Stansell III*, 771 F.3d at 726. The reasoning for this is that "notice upon commencement of a suit is [considered] adequate to give a judgment debtor advance warning of later proceedings undertaken to satisfy a judgment." *Id.* at 726 (citing Brown v. Liberty Loan Corp. of Duval, 539 F.2d 1355, 1364 (5th Cir. 1976)). So, for example, if a plaintiff obtains a default judgment against a defendant who was properly served in the initial case, then plaintiff generally need not notify defendant when it seeks to attach its assets to fulfill the outstanding judgment.

[451] *Stansell III*, 771 F.3d at 726. Some courts have held that alleged agencies and instrumentalities of terrorist parties are entitled to Fifth Amendment due process protections in TRIA actions, including the right to receive notice of post-judgment motions and the opportunity to be heard. *Id.* at 726–29. Other courts have disagreed with this approach and held that alleged agencies and instrumentalities of terrorist parties are not entitled to receive notice of post-judgment motions in TRIA suits. *E.g.*, Estate of Heiser v. Islamic Rep. of Iran, 807 F. Supp. 2d 9, 23 (D.D.C. 2011).

[452] In TRIA enforcement actions involving third parties that are neither agencies nor instrumentalities of terrorist parties, courts seem to agree they are entitled to Fifth Amendment procedural due process protections—including notice of suit and an opportunity to be heard—where they own, control, or are holding the targeted asset. *See, e.g.*, *Stansell III*, 771 F.3d at 726–27; Caballero v. Fuerzas Armadas Revolucionaries de Colombia, 2020 WL 11571726, at *4. That said, TRIA can undermine the rights of third parties that are not agencies or instrumentalities of terrorist parties in other ways, particularly when it comes to the priority of interests in a blocked asset. Specifically, where a third party has a property right in a blocked asset, TRIA subordinates that right to the rights of TRIA plaintiffs. *Hausler II*, 845 F. Supp. 2d at 569–71.

[453] *HLF*, 219 F. Supp. 2d at 78. *See* Ferrari, *supra* note 417, at 13 (noting that courts have historically rejected Takings Clause challenges to sanctions designations).

course, is that there *could* be a Takings Clause violation if the deprivation was permanent and vested ownership in the government.

TRIA raises the specter of such violations. As already discussed, TRIA transforms the "temporary" deprivation of U.S. sanctions into permanent confiscations. While those permanent confiscations do not vest the assets in the government, Takings Clause violations do not require that the government itself take ownership of the asset. Instead, a Takings Clause deprivation can occur where the government mandates or compels ownership to be transferred to a private party "without satisfying the 'public use' or 'just compensation'" requirements of the Takings Clause.[454] Although there is "no rigid formula" for defining public use, the concept essentially refers to the taking of property for a public purpose or benefit.[455] A "purely private benefit, or one that benefits only a small group, does not fall within the 'public use' requirement of the Takings Clause."[456] As for just compensation, it requires payment of the fair market price of the property at the time of the taking.[457]

As applied to TRIA, while the statute may not "mandate" or "compel" property transfers to private parties, it certainly makes such transfers highly likely. This arguably violates the Takings Clause by effectively transforming the government's so-called "temporary" blocking of assets into a permanent deprivation, without providing just compensation to the owners of the blocked assets and for the exclusive benefit of private plaintiffs[458] in terrorism-related cases.[459]

B. Policy Issues

Building on the previous section, this part looks at how private judgment enforcement efforts under TRIA and the Iran Threat Reduction Act exacerbate some of the well-established policy harms of U.S. sanctions.

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[454] W. Sales Trading Co. v. Genpro Int'l, Inc., 2021 WL 2188055, at *3–6 (Guam 2021).

[455] *Id.* at *5–6.

[456] *Id.* at *6.

[457] *Id.* at *7.

[458] One might argue that these judgment enforcement statutes do, in fact, have a public purpose because they reflect a desire to remediate the public threat posed by so-called terrorist actors. *See, e.g*, *Peterson*, 2013 WL 1155576, at *33 (observing that the Iran Threat Reduction Act does not violate the Takings Clause, in part, because it "seeks to address the "'unusual and extraordinary threat to the national security, foreign policy, and economy of the United States' that . . . Iran poses . . . "). This seems to sweep in too much, however—according to this logic, any act of violence impacting individuals or groups could be framed as a public threat in order to justify the taking of property.

[459] Nor would TRIA be the first judgment enforcement statute to violate the Takings Clause. For example, a turnover statute, which permitted a judgment creditor to take property from a third party who acquired assets from a judgment debtor, was held to violate the Takings Clause because it did not have a public use and did not provide just compensation. W. Sales Trading Co, 2021 WL 2188055 at *5–6.

One of the long-standing benefits of using sanctions for sending states has been that "responsibility for the devastation caused can often be hidden or shifted [onto] the victim [of sanctions]."[460] Thanks to the proliferation of critical scholarship over the last few decades, it has become harder and harder for states to deflect attention from the consequences of their sanctions policies. In particular, there is now a wealth of information about the harms sanctions create.

This section explores how the private enforcement of terrorism-related judgments reinforces and even worsens some of the harms generated by U.S. sanctions. In particular, it examines the ways in which suits under TRIA and the Iran Threat Reduction Act (1) exacerbate discrimination against Arabs, Middle Easterners, and Muslims embedded within terrorism-related sanctions regimes; (2) further wealth reductions in countries impacted by sanctions and transfer wealth to the United States in line with U.S. sanctions policies; and (3) permanently confiscate central bank assets blocked by problematic U.S. sanctions regimes, in violation of international law.

Before proceeding, it is worth noting a potential policy downside created by private judgment enforcement regimes that is not addressed here, namely, the impact those suits can have on U.S. foreign policy. There are concerns, for example, that TRIA suits can negatively impact U.S. sanctions policies, including by undermining the government's ability to use blocked assets as "bargaining chips in solving foreign policy disputes," and by exposing the United States "to the risk of reciprocal actions against U.S. assets by other States."[461] This view—that private judgment enforcement suits are potentially detrimental to U.S. foreign policy—is not an uncommon one. What is less appreciated, however, are the ways in which TRIA and Iran Threat Reduction Act claims actually bolster and support U.S. sanctions programs, particularly as they relate to the many downsides of those regimes. It is partly for this reason that this section focuses exclusively on those types of downsides.

Part IV.B begins by examining how TRIA and Iran Threat Reduction Act claims exacerbate the discrimination against Arabs, Middle Easterners, and Muslims embedded within certain sanctions policies. It then explores how those suits further wealth reductions in states impacted by sanctions and facilitate wealth transfers to the United States. This section ends by demonstrating how TRIA and Iran Threat Reduction claims enable the permanent confiscation of central bank assets blocked by troubling U.S. sanctions regimes, in violation of international law.

[460] Beal, *supra* note 39, at 148, 157.
[461] *Heiser I*, 885 F. Supp. 2d at 441.

1. Discriminating Against Arabs, Middle Easterners, and Muslims

The U.S. government's terrorism-related sanctions programs—from the FTO, SDT, and SDGT programs to the state sponsor of terrorism designation—are primarily aimed at Arab, Middle Eastern and/or Muslim individuals and entities. This is so even though Arabs, Middle Easterners, and Muslims are hardly alone when it comes to engaging in terrorist violence.[462] Judgment enforcement efforts under TRIA and the Iran Threat Reduction Act exacerbate these discriminatory effects.

To start with the FTO list, since the State Department first began making FTO designations in 1997,[463] sixty-seven of the eighty-eight total FTOs have been Arab, Middle Eastern, and/or Muslim.[464] Though subject to rules discussed earlier in this Article,[465] FTO designations are ultimately the result of political decision-making.[466] Describing the consequences of these politicized determinations, one scholar has argued that the government's FTO designation practices have "effectively . . . [been used to] halt almost all domestic activities and organizations associated with the Middle East or Islam under the auspices of combating terrorism."[467]

The motivations behind the SDT and SDGT designations, as well as historical and contemporary information on the individuals and groups designated under those programs, also demonstrate a disproportionate impact on Arab, Middle Eastern, and Muslim individuals and entities. To begin with their background motives, both EO 12,947, which created the Specially Designated Terrorist designation, and EO 13,224, which created the Specially Designated Global Terrorist designation, were the result of political decision making that effectively and exclusively associated the Arab, Middle Eastern, and Muslim world with terrorist activity. The original designations made under the SDT and SDGT orders reflected these biases. For example, as originally promulgated, EO 12,947—which as previously mentioned was aimed at those threatening the "Middle East peace process"[468]—targeted twelve SDTs.[469] Only two of those groups were Jewish-

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[462] Jamshidi, *supra* note 19, at 830 n. 513. Much of this section on sanctions-related discrimination against Arabs, Middle Easterners, and Muslims is drawn from my article, *The Private Enforcement of National Security, supra* note 19.

[463] Sean D. Murphy, *Payment of U.S. Arrears to the United Nations*, 94 AM. J. INT'L L. 348, 365 (2000).

[464] *Foreign Terrorist Organizations*, U.S. DEP'T OF STATE (July 26, 2023), https://www.state.gov/foreign-terrorist-organizations/ [https://perma.cc/JJ3U-M3JK].

[465] *See supra* note 423 and accompanying text.

[466] *See* Testimony of Professor David Cole on the Constitutionality of Counterterrorism Legislation Before the Senate Committee on the Judiciary, Subcommittee on Terrorism, Technology, and Government 5 (May 4, 1995) (criticizing the FTO designation authority for inviting the government to make designations in a "politically biased manner").

[467] Aziz, *supra* note 439, at 91.

[468] *See supra* note 419 and accompanying text.

[469] EO 12,947, *supra* note 418, at Annex.

Israeli, while ten were Arab or Palestinian.[470] As for EO 13,224, even though it was directed at the general threat of foreign terrorism, its twenty-seven original SDGTs were all Arab, Middle Eastern, and/or Muslim.[471]

Subsequent designations made under the SDT and SDGT orders evidence the continuing relevance of racial and religious discrimination to those designations. As previously referenced, EO 12,947 and EO 13,224 give executive branch authorities continuing discretion to list additional persons or entities they believe satisfy the order's requirements—discretion that, at the very least, permits the government to continue basing its designations on the political considerations underlying those orders.[472] In light of this, as well as its focus on the "Middle East peace process," it is likely that most other individuals or entities subsequently designated under the SDT order were also Arab or Palestinian. As for EO 13,224, the State Department—which is authorized to designate additional SDGTs—has adhered to the political interests underlying EO 13,224's origins and listed an additional 413 entities and individuals, of which 365 have been Arab, Middle Eastern, and/or Muslim organizations or individuals or those connected to such persons.[473]

As for the designation of state sponsors of terrorism, the Secretary of State has broad discretion to label states as supporters of terrorism, with designation decisions often turning less on a country's terrorist activities and more on political factors.[474] Since those designations first began, there have been eight designated state sponsors of terrorism, with six being Arab, Middle Eastern, and/or majority Muslim.[475] Being designated as a state sponsor not only automatically subjects

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[470] *Id.* In 1998, Executive Order 13,099 amended EO 12,947 to add three individuals and one organization to the original SDT list—all of whom were Arab, Middle Eastern, and/or Muslim. Exec. Order 13,099, 63 Fed. Reg. 45167 (Aug. 20, 1998).

[471] E.O. 13,224, *supra* note 425, at Annex. EO 13,224 was amended in 2002 by Executive Order 13,268, which added an additional individual and organization, both Middle Eastern and Muslim. Exec. Order 13,268, 67 Fed. Reg. 128 (July 2, 2002). As one scholar noted, by April 2005, 98% of the individuals and 96% of the entities on the SDGT list were Arab, Middle Eastern, or Muslim. Donohue, *supra* note 432, at 669.

[472] *See supra* notes 420, 430–31 and accompanying text.

[473] *Executive Order 13224*, U.S. DEP'T OF STATE (July 27, 2023), https://www.state.gov/executive-order-13224/ [https://perma.cc/FQU5-2VGB].

[474] Troy Homesley III, *"Towards a Strategy of Peace": Protecting the Iran Nuclear Accord Despite $46 Billion in State-Sponsored Terror Judgments*, 95 N.C. L. REV. 795, 819 (2017).

[475] DIANNE E. RENNACK, CONG. RES. SERV., R43835, STATE SPONSORS OF ACTS OF INTERNATIONAL TERRORISM—LEGISLATIVE PARAMETERS: IN BRIEF, 1, 8–9 (2006), https://sgp.fas.org/crs/terror/R43835.pdf [https://perma.cc/2AX5-ZV2U]. These Arab, Middle Eastern, and/or Muslim-majority countries are Iran, Libya, Sudan, Syria, South Yemen, and Iraq. *Id.* Cuba and North Korea have also been designated as state sponsors of terrorism. *Id.* at 1–2. Currently, Iran, Syria, Cuba, and North Korea are listed as state sponsors. *State Sponsors of Terrorism: Bureau of Counterterrorism*, U.S. DEP'T OF STATE (July 26, 2023), https://www.state.gov/state-sponsors-of-terrorism/ [https://perma.cc/H4CG-N2BN].

countries to certain U.S. sanctions programs;[476] designated states are often targets of comprehensive, country-based sanctions regimes, as well.[477]

Because they typically depend in some way on FTO, SDT, SDGT or state sponsor designations,[478] judgment enforcement efforts under TRIA and the Iran Threat Reduction Act inevitably replicate and reinforce these discriminatory effects on Arab, Middle Eastern, and Muslim individuals and entities.

2. Reducing Wealth in States Impacted by Sanctions & Transferring Wealth to the United States

U.S. sanctions—which by and large target the Global South—have a demonstrably negative impact, both directly and indirectly, on the wealth of nations affected by sanctions. They can even facilitate wealth transfers from those countries to the United States. Judgment enforcement efforts under TRIA and the Iran Threat Reduction Act contribute to this phenomenon in particularly stark and concrete ways.

The direct effects of sanctions are pervasive and well-documented. As sanctions expert Joy Gordon has noted, "recent years have seen increasing sophistication in the sanctions that do the greatest damage to critical networks or functions of a target country's economy and infrastructure" and that can bankrupt the sanctioned state.[479] This is particularly true of sanctions imposed by the United States.[480]

These devastating U.S. sanctions regimes are composed of both comprehensive country-based sanctions and targeted sanctions programs. Where comprehensive sanctions are concerned, these mechanisms can "trigger currency devaluation[s], inflation, and increased unemployment, as well as reduced access to food, power, industrial equipment and medicine" in impacted countries.[481] The economic consequences—including for the overall wealth—of targeted countries

[476] *See* Alison Elizabeth Chase, *Legal Mechanisms of the International Community and the United States Concerning State Sponsorship of Terrorism*, 45 VA. J. INT'L L. 41, 52–53 (2004) (describing some of the automatic sanctions triggered once a country is designated as a state sponsor of terrorism).

[477] Most of the government's comprehensive country-based sanctions regimes, which often implicate terrorism-related activities, have historically been aimed at Arab, Middle Eastern, and/or Muslim-majority countries that have also been designated at one time or another as state sponsors of terrorism. *See supra* note 475; Meredith Rathbone, et. al., *Sanctions, Sanctions Everywhere: Forging a Path Through Complex Transnational Sanctions Laws*, 44 GEO. J. INT'L L. 1055, 1068 (2013) (noting that four out of the six countries that had historically been subject to comprehensive economic and trade sanctions at the time were Arab, Middle Eastern, or Muslim-majority (Iran, Iraq, Libya and Sudan)).

[478] *See supra* notes 137–40, 143, 446–47 and accompanying text.

[479] Gordon, *supra* note 29, at 5–6.

[480] *Id.*

[481] Mullin, *supra* note 81, at 363.

can be catastrophic. For example, in 2020, the Cuban government estimated that six decades of comprehensive U.S. sanctions had cost the country $144 billion.[482] Between 2014 and 2020, U.S. sanctions against Venezuela reportedly cost the country approximately $120 billion.[483] While the data on North Korea is less reliable, one report from 2010 suggested that from the start of U.S. sanctions in the 1950s until 2005, those sanctions cost North Korea $13.7 trillion.[484] In Iraq, near-comprehensive, multilateral sanctions imposed by the UN Security Council from 1990 to 2003, at the behest of and largely controlled by the United States,[485] "destroyed nearly all of Iraq's infrastructure, industrial capacity, agriculture, telecommunications, and critical public services" and decreased annual per capital income from $3,510 in 1989 to $450 in 1996.[486]

Even targeted U.S. sanctions can substantially deplete the wealth of affected countries, generating similar effects to comprehensive country-based sanctions. This is particularly likely where sanctions are aimed at industries central to a country's economic well-being—like banking and natural resources or shipping and other infrastructure necessary for international trade-—or where they target an important group within the country. Like comprehensive country-based sanctions, these kinds of targeted sanctions can effectively "bankrupt" a state.[487] For example, cutting a country off from the international financial system through targeted sanctions against its banking industry typically causes "enormous damages to [the] state's economy."[488] Likewise, targeting a country's ability to use international shipping resources effectively starves it of income generated from trade.[489] Where sanctions target a group, like the Taliban, that controls a territory, an entire country, and/or its government, a similar effect can occur—sanctions against that group can effectively deplete the wealth of the entire territory the group governs or controls.[490]

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[482] Yaffe, *supra* note 182, at 143.
[483] *Id.* at 144. While described as targeted, the range and focus of U.S. sanctions against Venezuela arguably constitute a comprehensive country-based sanctions system. *See generally* CLARE RIBANDO SEELKE, CONG. RSCH. SERV., IF10715, VENEZUELA: OVERVIEW OF U.S. SANCTIONS 2–3 (2022), https://sgp.fas.org/crs/row/IF10715.pdf [https://perma.cc/QQQ7-2BTP] (describing various U.S. sanctions against Venezuela). Even if this is not the case, targeted sanctions can effectively function as comprehensive country-based sanctions, as discussed below. *See infra* notes 487–90 and accompanying text.
[484] Beal, *supra* note 39, at 148, 157.
[485] JOY GORDON, INVISIBLE WAR: THE UNITED STATES AND THE IRAQ SANCTIONS 141 (2010).
[486] *Id.* at 1, 21.
[487] Gordon, *supra* note 29, at 6.
[488] *Id.* at 7.
[489] *Id.* at 7–8.
[490] Since the Taliban came to power in Afghanistan, multilateral sanctions against the group—which include U.S. sanctions—have effectively served as a de facto sanctions regime against Afghanistan itself, depriving the country of access to international aid, banking, as well as its own assets, including the central bank funds previously discussed. William Byrd, *One Year Later, Taliban Unable to Reverse Afghanistan's Economic Decline*, U.S. INSTITUTE OF PEACE (Aug. 8, 2022), https://www.usip.org/publications/2022/08/one-year-later-taliban-unable-reverse-afghanistans-economic-decline [https://perma.cc/6D26-A47M]. In February 2022, the U.S. Treasury issued General License 20, ostensibly hoping to remediate this problem. OFAC, *General License 20: Authorizing Transactions Involving Governing Institutions in Afghanistan*, U.S. DEP'T

Beyond these direct effects of country-based and targeted sanctions, countries can experience wealth depletion in more indirect ways as well, thanks in large part to the expansive reach of U.S. sanctions and the substantial penalties they carry. Operating in regions subject to significant U.S. sanctions restrictions comes with increased financial cost and risk for organizations.[491] As a result, businesses, especially financial institutions, often choose not to operate in such risk laden locations,[492] especially where the expected economic return is low.[493] This phenomenon—which is known as "de-risking"—can generate "persistent economic inequality and lead to slower economic growth" in those regions,[494] which are disproportionately in the Global South. For example, U.S. sanctions have pushed major international banks to end their correspondent banking relationships in "high-risk areas," like the Middle East and Africa, and to refuse to serve money service businesses ("MSBs"), which are composed of individuals and institutions[495] that often act as alternative financial service providers in the developing world.[496]

In addition to depleting a country's wealth, U.S. sanctions can affirmatively transfer wealth to the United States itself. This can occur where sanctions bolster or protect domestic U.S. industries. In the 1990s, for example, congressional representatives from oil-producing American states favored tightening sanctions on Iraq based, in part, on their perception that Iraqi oil would compete with the U.S. oil industry.[497] Similarly, U.S. sanctions implemented against Iran in November 1979—which were ostensibly a response to the Iranian hostage crisis—were, in fact, initially designed to protect U.S. banks from Iran's imminent withdrawal of assets held in those institutions.[498] Sanctions-related wealth transfers can also occur where blocked assets generate indirect benefits for the U.S. banking system. As one court has noted, blocked assets that remain "idle in the banks' vaults" can potentially be put to "beneficial use" and otherwise benefit the bank.[499]

OF TREASURY (Feb. 25, 2022), https://ofac.treasury.gov/media/918776/download?inline [https://perma.cc/UUQ5-9U2M]**.** As that license explains, the U.S. government's Taliban-related sanctions do not apply to Afghanistan itself, the Afghan government or government agencies, or to Afghanistan's public and private banks. *Id.* The license still, however, prohibits transactions with members of the Taliban including sanctioned individuals who are the heads of government institutions, absent certain exceptions. *Id.* Unsurprisingly—given these carve outs as well as the devastation already caused by U.S. sanctions—General License 20 does not seem to have done much to reverse the adverse impact of Taliban-related sanctions on Afghanistan.

[491] Van Genugten, *supra* note 46, at 156–57.

[492] *Id.*

[493] Anglin, *supra* note 25, at 715.

[494] Van Genugten, *supra* note 46, *at* 156–57.

[495] *Money Services Business Definition*, FINANCIAL CRIMES ENFORCEMENT NETWORK, U.S. DEP'T OF TREASURY, (July 26, 2023), https://www.fincen.gov/money-services-business-definition [https://perma.cc/68KA-RZSU].

[496] Anglin, *supra* note 25, at 715–17.

[497] GORDON, *supra* note 485, at 159.

[498] SASAN FAYAZMANESH, THE UNITED STATES AND IRAN: SANCTIONS, WARS AND THE POLICY OF DUAL CONTAINMENT 13 (2008); Carter, *supra* note 157, at 1232 n. 291.

[499] *Hausler I*, 740 F. Supp. 2d at 538–39.

These wealth depleting and transferal trends are reinforced and exacerbated by judgment enforcement efforts under TRIA and the Iran Threat Reduction Act. From directly targeting the assets of foreign states, their agencies, and instrumentalities to pursuing properties of other, independently sanctioned individuals and entities—like central banks[500] and other financial institutions—TRIA and the Iran Threat Reduction Act deplete the wealth of states impacted by sanctions. They also concretely and clearly transfer that wealth to parties—namely plaintiffs in terrorism cases—who are largely located in the United States. While one might sympathize with these plaintiffs, their financial restitution depletes the economic wealth not just of "terrorist parties" but also, often, of entire countries.[501] In addition, these plaintiffs do not typically receive the bulk of funds seized through their judgment enforcement suits. Instead, it is their attorneys—who often take these terrorism cases on a contingency basis—that substantially benefit, collecting hundreds of millions of dollars in legal fees as a result of successful judgment enforcement litigation.[502]

3. Targeting Central Bank Assets

Finally, amongst some of the most concerning trends in U.S. sanctions policy is their increasing use against the assets of central banks. Private judgment enforcement suits under TRIA and the Iran Threat Reduction Act also target central bank assets, doing so in ways that exacerbate and arguably worsen the harms already created by U.S. sanctions programs.

Like the country-based and targeted sanctions discussed in Part IV.B.2, sanctioning a country's central bank—which often serves a variety of important

[500] *See infra* note 503 and accompanying text for a discussion of the economic importance of central bank assets.

[501] Some victims of terrorism are eligible to receive compensation from funds created by Congress, at least partially obviating the need to pursue sanctioned assets. These funds include the United States Victims of State Sponsors Terrorism Fund ("USVSSTF"). Consolidated Appropriations Act, Pub. L. 114-113, 129 Stat. 2242, Title IV, § 404 (2015) (codified at 34 U.S.C. § 20144). The USVSSTF fund allows for payments of certain damages to particular U.S. persons, including those with final judgments under Sections 1605(a)(7) or 1605A against any designated state sponsor of terrorism. 34 U.S.C. § 20144(c). The congressionally-created September 11th Victims Compensation Fund also exists to "provide compensation for any individuals (or a personal representative of a deceased individual) who suffered physical harm or was killed as a result of the terrorist-related aircraft crashes of September 11, 2001 or the debris removal efforts that took place in the immediate aftermath of those crashes." *September 11th Victim Compensation Fund*, U.S. DEP'T OF JUSTICE, https://www.justice.gov/civil/vcf [https://perma.cc/8V3E-KW3U]. While these funds are an alternative means for compensating victims of terrorism, they admittedly do not cover the breadth of claims and claimants covered by TRIA.

[502] According to one estimate, TRIA suits brought against Afghanistan's central bank would, if successful, create a "windfall of $525 million in legal fees" for plaintiffs' attorneys. Lee Fang, *Lawyers and Lobbyists Fighting for Their Slice of $3.5 Billion in Money Seized by the Biden Administration*, THE INTERCEPT, Feb. 16, 2022, https://theintercept.com/2022/02/16/afghanistan-funds-biden-september-11-lawyers-lobbyists/ [https://perma.cc/D93Y-XMFE].

economic functions, including keeping the value of a country's currency at a fixed rate; maintaining liquidity in case of an economic crisis; satisfying a country's international financial commitments, like financing imports; and funding domestic projects[503]—can be devastating to a country's economy. Thanks to U.S. dollar dominance, the United States is well-positioned to institute sanctions on central banks and is exploiting that power.

Since the end of World War II, the U.S. dollar has been the pre-eminent reserve currency.[504] A reserve currency is the "foreign currency that a central bank or treasury holds as part of its country's formal foreign exchange reserves."[505] Given the dollar's strength, the central banks of many foreign countries typically hold at least some of their reserves in U.S. dollars in the United States or in U.S. banks.[506] Over the last decade, the United States has taken advantage of this situation to block the assets of several foreign central banks held in the United States or by U.S. persons, including the central banks of Iran,[507] Venezuela,[508] and Russia.[509]

Like U.S. sanctions policy, private judgment enforcement suits under TRIA and the Iran Threat Reduction Act target central bank assets. At the same time, these judgment enforcement suits arguably worsen the harms of U.S. sanctions programs. Unlike sanctions on central banks assets, these suits—where successful—inevitably result in the permanent seizure of central bank funds. This not only permanently deprives a country of critical financial resources; it does so in violation of international laws protecting central bank assets from judicial restraint.[510]

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[503] *Currency Reserves: What Are They and Why Do They Matter?*, FOREX (June 21, 2021), https://www.forex.com/en-us/market-analysis/latest-research/what-are-currency-reserves/ [https://perma.cc/C3Q4-SZPX].

[504] CHARLES MAIER, AMONG EMPIRES: AMERICAN ASCENDANCY AND ITS PREDECESSORS 209 (2006).

[505] Anshu Siripurapo & Noah Berman, *The Dollar: The World's Reserve Currency*, COUNCIL ON FOREIGN RELATIONS, (July 19, 2023), https://www.cfr.org/backgrounder/dollar-worlds-currency#chapter-title-0-4 [https://perma.cc/QNT5-ARBZ].

[506] Jonathan Spicer, *Special Report: How the Federal Reserve Serves U.S. Foreign Intelligence*, REUTERS, (June 26, 2017), https://www.reuters.com/article/us-fed-accounts-intelligence-specialrepo/special-report-how-the-federal-reserve-serves-u-s-foreign-intelligence-idUSKBN19H198 [https://perma.cc/5UXL-LKUB].

[507] *See supra* note 244 and accompanying text.

[508] OFAC, *Treasury Sanctions Central Bank of Venezuela and Director of the Central Bank of Venezuela*, U.S. DEP'T OF TREASURY (Apr. 17, 2019), https://home.treasury.gov/news/press-releases/sm661 [https://perma.cc/8XHQ-WK52].

[509] OFAC, *Treasury Prohibits Transactions with Central Bank of Russia and Imposes Sanctions on Key Sources of Russia's Wealth*, U.S. DEP'T OF TREASURY (Feb. 28, 2022), https://home.treasury.gov/news/press-releases/jy0612 [https://perma.cc/ZC3W-SRKE].

[510] As discussed below, international law clearly protects at least certain kinds of central bank assets from judgment enforcement efforts because those efforts involve judicial action. *See infra* notes 511–14 and accompanying text. It is less clear, however, whether international law also protects central bank assets from sanctions. Some argue that international law provides no such protections, since sanctions against a central bank's assets do not involve courts or executing or

Under various sources of international law, the assets of foreign central banks enjoy significant protections from judgment enforcement measures.[511] For example, under customary international law, foreign central bank assets cannot be used to satisfy a court judgment unless those assets are used by the bank for commercial activities.[512] For its part, the UN Convention on the Jurisdictional Immunities of States and Their Property—a treaty that has been signed by twenty-eight states but has not yet entered into force—gives central bank assets near absolute immunity from judicial attachment and execution.[513] Even at the domestic level, most states provide robust protections for foreign central bank assets, either bestowing virtually absolute protections against judgment enforcement efforts on those assets or protecting them from execution as long as they are used for government or sovereign purposes.[514]

TRIA and the Iran Threat Reduction Act violate even the most modest international law protections for central bank property. TRIA has been construed, for instance, as applying to the central bank assets of state sponsors of terrorism, even if those assets are not used for commercial activity.[515] For its part, the Iran

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enforcing court judgments. Ingrid (Wuerth) Brunk, *Does Foreign Sovereign Immunity Apply to Sanctions on Central Banks?*, LAWFARE, Mar. 7, 2022, https://www.lawfareblog.com/does-foreign-sovereign-immunity-apply-sanctions-central-banks [https://perma.cc/8G4Z-P5AG]. Others disagree and insist that sanctions against the assets of central banks can violate international law protections for those properties without any judicial involvement. Jean-Marc Thouvenin & Victor Grandaubert, *Material Scope of State Immunity from Execution, in* CAMBRIDGE HANDBOOK OF IMMUNITIES AND INTERNATIONAL LAW 250–51 (Tom Ruys et al., eds., 2019). While beyond the scope of this Article, one might argue that, at the very least, sanctions that facilitate judgment enforcement efforts against central bank assets do, in fact, violate international law protections for those assets.

[511] While central bank immunity applies both to pre- and post-judgment enforcement efforts, this section focuses on post-judgment efforts since they are co-extensive with TRIA and the Iran Threat Reduction Act. *See* Ingrid Wuerth, *Immunity from Execution of Central Bank Assets, in* CAMBRIDGE HANDBOOK ON IMMUNITIES AND INTERNATIONAL LAW 267 (Tom Ruys et al. eds., 2019) (noting that "many countries protect the property of central banks from both pre- and post-judgment measures of constraint").

[512] *Id.* at 280. The only exception to this rule is where the relevant authority waives the bank's immunity. *Id.*

[513] U.N. Convention on the Jurisdictional Immunities of States and Their Property, art. 21(1)(c), Dec. 2, 2014, 3 U.N.T.S. 13. The treaty has not entered into force. *Status, UN Convention on the Jurisdictional Immunities of States and Their Property*, U.N. TREATY COLLECTION (Dec. 2, 2004), https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=III-13&chapter=3&clang=_en [https://perma.cc/6E74-FFYH] [hereinafter *Jurisdictional Immunities Convention*]. *See* Wuerth*, supra* note 511, at 269 (describing the *Jurisdictional Immunities Convention* as giving near absolute immunity to central bank assets when it comes to execution).

[514] Wuerth*, supra* note 511, at 266. It is worth noting that, while some countries provide weaker protections than these for foreign central bank assets, "the general trend [within states] is towards greater protection of" such assets. *Id.*

[515] Peterson, 2013 WL 1155576, at *35.

Threat Reduction Act specifically allows plaintiffs to seize Iran's central bank assets[516] without regard to their use or purpose.[517]

While U.S. sanctions against central bank property can create significant financial harms for a sanctioned country, both TRIA and the Iran Threat Reduction Act arguably make those harms even worse, by facilitating the permanent confiscation of blocked central bank assets in violation of even the most minimum requirements of international law.

CONCLUSION

As this Article has demonstrated, sanctions are not the exclusive province of governments and inter-governmental organizations. Rather, private actors also play various roles in sanctions regimes. In particular, when it comes to judgment enforcement suits under TRIA and the Iran Threat Reduction Act, private plaintiffs utilize U.S. sanctions to realize their parochial, monetary interests—indeed, they depend upon sanctions to fulfill those financial goals. Through this involvement in the sanctions system, plaintiffs can shape and, at times, even expand the reach of U.S. sanctions, as well as reinforce and even worsen some of the U.S. government's most troubling sanctions practices and policies.

As this Article has endeavored to show, it is important to take seriously the intimate and often problematic relationship between U.S. sanctions authorities and private suits brought under TRIA and the Iran Threat Reduction Act. And though it does not propose any remedies to those problems, this Article encourages us to think twice before we heap praise on those judgment enforcement frameworks or further expand their reach.

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[516] *See supra* note 245–46 and accompanying text.
[517] *See* Wuerth, *supra* note 511, at 284 (arguing that Iran's central bank assets should have been immune from execution in the *Peterson* case).